In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN, *Petitioner*

VS.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
First Appellate District, Division Three

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Petitioner Roy Splawn prays that a Writ of Certiorari issue to review the judgment and order of the Court of Appeal of the State of California, First Appellate District, Division Three, filed in the above-entitled case on March 29, 1976.

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Three, affirming the judgment of the trial court was filed on March 29, 1976, but has not been and will not be officially

reported and published. See *California Rules of Court,* Rule 976. The opinion is set out in full as Appendix A of this Petition.

JURISDICTION

On June 22, 1971, Petitioner was convicted in the Superior Court of the State of California for the County of San Mateo of a violation of California Penal Code Section 311.2, the obscenity statute. On July 26, 1971, judgment was entered upon the conviction and an appeal was timely perfected in the California Court of Appeal, which affirmed the judgment in an opinion filed on January 11, 1973. A Petition for Hearing in the California Supreme Court was timely filed on February 16, 1973, and was denied without opinion on March 8, 1973.

A Petition for Certiorari was then filed with this Court. Certiorari was granted, the judgment of the Court of Appeal was vacated and the case was remanded for reconsideration in light of *Miller v. California,* 413 U.S. 15, and its siblings. *Splawn v. California,* 414 U.S. 1120.

Thereafter, the California Court of Appeal once again affirmed the conviction. A Petition for Hearing before the California Supreme Court was denied on May 26, 1976, by an order, a copy of which is set out herein as Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Was Petitioner subjected to an *ex post facto* application of California obscenity law where he was convicted by the use at trial of a "pandering" law which was not in force at the time of the offense and with which he was not charged in the Information?

2. In an obscenity prosecution of a retail bookstore owner not shown to have any connection with the creator or publisher of the matter in question, is it constitutional to instruct the jury that the financial motives of the creator of the material could be considered evidence that the material was "obscene"?

3. Is a retail bookstore owner denied due process when his conviction of an obscenity violation is based on the motives and behavior of persons with whom he has no connection and over whom he has no control?

4. Is an obscenity conviction premised upon "pandering" constitutionally permissible where there is no evidence of commercially exploitative behavior by the defendant?

5. Does a state invidiously discriminate against retail bookstore personnel when it legislates an obscenity law which excludes from liability motion picture operators and projectionists, but no others?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I, provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment XIV, provides, in material part, that:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. California Penal Code Section 311.2 provided, at the time of this case, that:

> (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.
>
> (b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who

> is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place where he is so employed.

4. California Penal Code Section 311 provided, at the time of the offense, Stats. 1961 ch. 2147, that:

> (a) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, take as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters, and is matter which is utterly without redeeming social importance.
>
> (b) "Matter" means any books, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.
>
> (c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.
>
> (d) "Distribute" means to transfer possession of, whether with or without consideration.
>
> (e) "Knowingly" means having knowledge that the matter is obscene.

STATEMENT OF THE CASE

Petitioner, Roy Splawn, his brother Don and one other person, Robert Esselstein, were charged, on November 19, 1969, with one count of felony conspiracy. The Complaint, and subsequently the Information, each charged a conspiracy to commit a misdemeanor violation of California Penal Code §311.2, the California obscenity statute. The conspiracy was charged to have commenced on August 1, 1969, and to have terminated on November 7, 1969. Each defendant was also charged with a misdemeanor Penal Code §311.2 obscenity violation. After pleas of not guilty, and appropriate motions, which were denied, jury trial started on June 7, 1970. On June 18, the People moved to dismiss the charges against the defendant Esselstein, which motion was granted. On June 22, the jury returned verdicts of Not Guilty as to all counts against Donald Splawn, a verdict of Not Guilty as to the Felony Conspiracy count against petitioner Roy Splawn, and a verdict of Guilty against petitioner Roy Splawn on the misdemeanor count of violation of California Penal Code Section 311.2—the obscenity statute.

On July 26, petitioner's motion for probation was denied and he was sentenced to ninety-one (91) days in the County Jail, one (1) day suspended, and ordered to pay a fine of one thousand dollars ($1,000.00) plus state assessment. Bond on Appeal of twelve hundred fifty dollars ($1,250.00) was posted and the execution of the sentence stayed pending appellate review.

The appellate history of this case has been set forth in the Jurisdictional Statement.

EVIDENCE AND INSTRUCTIONS

I

On July 31, 1969, a Redwood City, California, reserve police officer, who was a carpetlayer by trade, went, in an "undercover" capacity, to a bookstore owned by petitioner. (R.T. 27-8)[1] There he found petitioner's brother, Don, working behind the sales counter. The policeman asked to see petitioner Roy Splawn about purchasing some "hard-core" "under-the-counter" films. (R.T. 28). Although the store sold materials with sexual content, no such films were carried in the store. (R.T. 28-29). The officer was told to return the next day. (R.T. 29). When he so returned, neither petitioner Roy Splawn nor the requested films were present. (R.T. 30).

The officer left and the matter was apparently dropped until November 4, 1969. On November 4 and 5, the officer made repeated contacts with Don Splawn in an attempt to buy films, which were still not for sale in the store. (R.T. 32). Finally, in the evening of November 5, the officer found petitioner Roy Splawn in the store and told him he wanted "hard-core" movies. (R.T. 46-47).

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[1] "R.T." refers to the Reporter's Transcript. "C.T." refers to the Clerk's Transcript.

Petitioner told the officer that he did not have any such films but that he could get them from San Francisco. (R.T. 47).

On November 7, 1969, the officer came to petitioner's store, where he obtained from Robert Esselstein, a clerk, a package containing two reels of film which graphically displayed sexual behavior, for which he paid seventy dollars. (R.T. 5, 96).

Roy Splawn was convicted for distributing those two reels of film.

II

The offense of which Petitioner was convicted was not charged by the prosecution in the context of the circumstances of production, distribution or publicity of the films in question. No reference to any pandering activity is found in the information. (C.T. 7).

Three days *after* the date of Petitioner's offense, an amendment to California's obscenity law became effective, which provided that:[2]

> In prosecutions under this chapter where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.
>
> P.C. 311(a)(2), effective November 10, 1969.

[2]Without this amendment, the California Supreme Court had held that the prosecution could not go to the jury on a "pandering" theory, at least where "pandering" was not charged in the indictment or information. *People v. Noroff*, 67 C.2d 791 (1967).

Nevertheless, the trial court instructed the jury on the issue of "pandering", as follows:

> (1) [i]n determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled is a matter for you, the Jury, to determine. (R.T. 882).
>
> (2) Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter [is] utterly without redeeming social importance. *(Id.)*
>
> (3) If the object of work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious case, this may be considered as evidence that the work is obscene. (R.T. 883).

HOW THE FEDERAL QUESTIONS ARE PRESENTED

1. Petitioner objected to the trial court's instructions on pandering (R.T. 755-758) and both on appeal and in his Petition for Hearing in the California Supreme Court urged

(a) that the giving of any "pandering" instructions constituted an *ex post facto* application of the law and

(b) that the instructions given on "pandering" denied him both his due process and free speech rights under the federal constitution. These contentions were rejected by the trial court, the Court of Appeal (Appendix A, pp. viii-ix, *infra*) and inferentially, by the California Supreme Court (Appendix B, *infra*).

2. Petitioner moved the trial court to dismiss the information on the ground that the California obscenity statute denied petitioner equal protection of the law under the Fourteenth Amendment. (C.T. 31-34). The motion was denied. The question was again raised on appeal and by Petition for Hearing and Petitioner's position was again rejected (Appendix A, pp. iii-iv, *infra*; Appendix B).

REASONS FOR GRANTING THE WRIT

I

REVIEW MUST BE GRANTED TO CORRECT THE SERIOUS UNCONSTITUTIONAL MISAPPLICATION OF THIS COURT'S "PANDERING" DOCTRINE TO PETITIONER AND TO SET FORTH THE MANNER IN WHICH THIS DOCTRINE IS TO BE APPLIED TO RETAIL SALES

A

This Court's "Pandering" Doctrine Is Limited To Evidence Of Exploitative Behavior By Those On Trial In Close Cases.

In 1966, this Court enunciated a rule of evidence, applicable to obscenity cases, known as the "pandering" doctrine. This doctrine permits the fact finder, in close cases, to consider evidence of the way in which a defendant treated material in the marketplace to help it evaluate his claim at trial that the material has "social value". The doctrine is a limited one, as a brief review of the facts of *Ginzburg v. United States,* 383 U.S. 463, the seminal case of this Court dealing directly with the matter, plainly shows.

In *Ginzburg,* evidence at trial established that the defendant had engaged in a widespread advertising campaign in which he stressed the sexual candor of his material and boasted that full advantage was being taken of "an unrestricted license allowed by law in the expression of sex and sexual matter". 383 U.S. at 468. Ginzburg commenced his advertising from towns whose names had sexual implications, represented his publications as erotically arousing, and, as to at least one book, proclaimed its obscenity, 383

U.S. at 470, 472. At trial, Ginzburg introduced evidence of the "social value" of his material. The trier of fact was permitted to consider evidence of Ginsburg's advertising campaign to help it determine if Ginzburg's claim of social value was sham. This Court, after considering the propriety of such evidence, concluded that

> [w]e perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test. 383 U.S. at 474.

This short review of the factual setting which gave birth to the "pandering" doctrine clearly shows its limitations:

1. The doctrine is permitted only as a means of controlling commercial *exploitation* of potential unhealthy (i.e., prurient) aspects of sexual material. The doctrine has no application to commercial activity which is not exploitative.
2. The doctrine is limited to evidence of a *defendant's* behavior.
3. The doctrine affects only the issue of the existence of social value, or its present doctrinal equivalent.
4. The doctrine is limited to "close" cases.

The result of the application of the pandering doctrine is to permit some material which on its face is not obscene, because it appears to have social value or to be serious, to be treated as though it did not;

it permits material entitled to constitutional protection in a neutral environment to be stigmatized as obscene because of the manner in which it has been treated by those on trial.

It is obvious that the only justifications for the application of a doctrine which undercuts the strict criteria otherwise necessary for a finding of obscenity are to permit focus upon the behavior of those on trial, and to control improper, exploitative behavior with respect to sexual materials. Thus, if the pandering doctrine is enlarged to include consideration of the behavior of those who are not on trial, or if it is applied to neutral sales activity which contains no elements of exploitation, it loses its constitutional justification and denies defendants their constitutional rights to disseminate material with sexual content and their due process rights to be tried on the basis of their behavior rather than that of someone else with whom they have no connection.

As this case shows, see *infra,* the pandering doctrine is presently subject to misinterpretation and abuse because there has been no appropriate analysis by this Court limiting the pandering doctrine to its proper use. This Court should therefore enunciate the principles which will permit the doctrine to fulfill its intended function but no others.

B

This Case Furnishes An Appropriate Vehicle For Resolving Important Issues Regarding This Court's Pandering Doctrine.

This case squarely presents three fundamental issues concerning the applicability of the pandering doctrine to retail sellers:

(1) Whether pandering instructions are proper in all obscenity cases regardless of a defendant's behavior;

(2) Whether instructions which focus on the motive of the creator or producer of the material in question are constitutionally proper in the trial of a retail seller having no connection with the creator or seller; and

(3) Whether instructions which permit evidence of pandering to be considered on the issues of prurient appeal and patent offensiveness are constitutional.

1.

The opinion of the Court of Appeals, Appendix "A", is devoid of facts indicating exploitative behavior by Petitioner. The opinion merely recites that a sale of films for $70.00 was made (page 4). The record shows that the buyer, an undercover agent, made over six attempts to obtain films before he was successful (Reporter's transcript, pp. 28, 30-37, 45-47, 326-9).[3]

[3]While this is not reflected in the opinion, it was brought to the attention of the Court of Appeals both in Appellant's Opening Brief, pp. 4-5, and Appellant's Petition for Rehearing, p. 3.

Thus it is evident that we have here a typical sale without advertising or puffing by the seller. Is such a sales transaction pandering? Are pandering instructions constitutionally proper on such evidence under the United States Constitution?

While it is now clear that commercial *activity* involving sexual material will continue to be subject to governmental regulation, *Miller v. California,* 413 U.S. 15, *supra,* this does not mean that all commercial activity involving sexual material amounts to commercial *exploitation* of that class of material. Although the California Court of Appeals did not, this Court must clearly draw the distinction between commercial *activity* and commercial *exploitation.* If it fails to do so, retail sellers, both owners and their employees, will be afraid and unable to engage in simple sales transactions for fear that their conduct will be labeled as pandering. And if juries are told that they may dispense with some of the prerequisite criteria for a finding of obscenity because of normal sales activity, then much material of value will be wrongfully tainted as obscene.

Before a jury, by being instructed on pandering, is invited to dispense with or relax some of the necessary elements of obscenity, there must be evidence which shows behavior beyond normal sales activity. Where no exploitative behavior is present, it is error to apply the doctrine of pandering. Cf. *Thompson v. Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157; *Barr v. Columbia,* 378 U.S. 146.

This Court should so hold.

2.

In this case, the jury was instructed that

(a) they could consider circumstances of production, among other things, to determine if the material in question was being exploited by petitioner;

(b) if the "purveyor's" sole emphasis was upon the sexually *provocative* aspects of the material, that "fact" *alone* could justify the conclusion that the material was utterly without redeeming social importance;

(c) if the object of the material was financial gain for the *creator,* such a fact could be considered evidence that the material was *"obscene"*.

No instruction limited the above considerations to the situation in which the case was a close one.

These instructions demonstrate substantial constitutional error.

1. In the first place, they destroy the requirement that material must meet California's three part test[4] before it can be found to be obscene. Thus, "provocativeness" rather than prurience becomes the test for obscenity under the instructions. Further, under the instructions provocativeness may negate social value, no matter how valuable the material is. And, most seriously, the instructions dictate the applica-

[4]This case was tried pursuant to California Penal Code 311(a), which substantially tracks the test set forth in *Memoirs v. Massachusetts,* 383 U.S. 413. However, the analysis applies equally to the new *Miller* criteria.

tion of a test which makes "financial gain for the creator" evidence of "obscenity" in general. In other words, under the instructions, evidence that the *creator* was financially motivated is evidence that the material is prurient, is patently offensive, and utterly lacks social value. Thus, the test set forth in the instructions totally undercuts the basic First Amendment rationale requiring a strict standard for suppression of material because of its *content.*

2. If "provocativeness" and the financial motives of the creator are to be tests for *obscenity,* there will be no way in which dealers can receive fair notice of what is prohibited.

3. The instructions permitted findings upon the three issues related to the obscenity of the material to be based upon the motive and behavior of persons who were not on trial, and with whom defendant had no connection. In this trial of a retail seller, the jury was told that the motives and behavior of the creator of the material could be considered evidence that the material was *obscene.* These "pandering" instructions placed responsibility upon defendant for the behavior of others not connected with him.

Even if there were no First Amendment issues present in this case, this would be serious error, for it is axiomatic that one cannot be held criminally responsible for the behavior and motives of others absent some clear connection between them. In the First Amendment context, it is obvious that the pandering doctrine was misapplied, for the instructions permitted focus upon the treatment of the material

by others, not defendant, and *the behavior of others was thus permitted to determine the character of the material in the hands of defendant.*

In a nutshell, pandering law was misapplied because under the instructions "the conduct of the defendant" was not the "central issue" of his trial, cf. *Roth v. U.S.*, 354 U.S. 476 (Warren, C.J., concurring)

The Court should hear this case to correct these and future similar obvious abuses of the pandering doctrine, which otherwise inhibit First Amendment activity and deny due process to retail sellers.

II

THE PETITION SHOULD BE GRANTED TO DECLARE THAT CALIFORNIA OBSCENITY LAW IS UNCONSTITUTIONAL BECAUSE IT INVIDIOUSLY DISCRIMINATES AGAINST RETAIL SELLERS OF BOOKS, MAGAZINES AND FILMS.

A.

At the time of the trial herein, California Penal Code Section 311.2 excluded from criminal liability a motion picture operator or a projectionist of a film when he had no financial interest in his place of employment. Penal Code Section 311.2(b).

It left necessary employees of theaters free from potential penalty but allowed the prosecution of anyone who sold a book, magazine or film, rather than showed a film.

Such a classification appears to be without justification. In any event, such a classification clearly burdens those who would deal in books and magazines, or sell rather than project films.

When a classification is challenged as affecting the exercise of fundamental First Amendment freedoms, it must be shown by the State to be necessary to promote a compelling state interest and to be drawn so as to achieve its object without unnecessarily burdening or restricting constitutionally protected activity. See, e.g., *Sherbert v. Verner,* 374 U.S. 398, 406; *Shelton v. Tucker,* 364 U.S. 479, 488; cf. *Dunn v. Blumstein,* 405 U.S. 330.

If California's purpose was to protect "innocent" employee operators or projectionists it had no constitutionally permissible basis for refusing that same protection to employee retail clerks who would, by hypothesis, have even less knowledge of the content of the goods they handled than a projectionist and certainly would have less knowledge and control than a motion picture operator. Indeed, it is difficult to imagine a *compelling* state interest promoted by California's discriminatory statute.

Defendant Splawn did no more than sell two films. Yet, his behavior, under the statute, makes him subject to conviction when those with similar functions (relative to the business of showing films) are immune. This discrimination, lacking a compelling justification, deprived Splawn of equal protection of the law.

Projectionists can exhibit regardless of their degree of control over the exhibition. As "exhibition"

presumably covers all their necessary job functions, they are free from all prosecution.

Operators can exhibit regardless of their degree of control. Thus, operators are free to manage or otherwise run theaters any way they please. They can advertise and they can pander, and still not be subject to prosecution.

Booksellers and film dealers on the other hand, cannot exhibit, or distribute, which means that they are liable for prosecution for doing the obvious fundamental acts for which they are either hired or in business. As many persons employed by bookstores have duties related to putting books on the shelves for sale, they in the normal course of their duties are involved in the exhibition of the material and are therefore subject to prosecution. Lastly, a clerk, with specified duties over which he has no control, cannot stand mute and take money for a book or magazine, while a movie operator is free to do as he pleases.

This scheme appears to make no sense. In any event, it invidiously discriminates against bookstore and film store personnel without a compelling state interest and is therefore unconstitutional.

Further, petitioner Splawn, the operator of the retail store, was convicted under a statute which classifies those who can be subject to criminal liability by their status as one with a "financial interest" in their place of employment. This statutory scheme is discriminatory; it operates to place burdens upon the book, magazine and film retail sales trade which can-

not be justified simply because of its commercial character and the possible financial interests of a potential defendant. See *Ginzburg, supra,* at 474; *New York Times v. Sullivan,* 376 U.S. 254; *Smith v. California,* 361 U.S. 147, 150.

Thus, while defendant Splawn's conduct might be regulated in this field under a more precisely drawn scheme, the statute itself is void on its face. See e.g., *Thornhill v. Alabama,* 310 U.S. 88; *N.A.A.C.P. v. Button,* 371 U.S. 415, 432-33; *Baggett v. Bullitt,* 377 U.S. 360, 366.

This Court should not condone the continuing vitality of a statute which grossly discriminates against classes of persons exercising their First Amendment rights and should therefore grant a hearing in this case to strike down Cal. P.C. 311.2.

III.

SERIOUS CONSTITUTIONAL ERROR WAS COMMITTED BY THE RETROACTIVE APPLICATION OF PENAL CODE SECTION 311(a)(2) TO THE FACTS OF THIS CASE.

The events which gave rise to Petitioner's prosecution occurred between July 31 and November 7, 1969. During that time there was no California Penal Code Section 311(a)(2); no California statute or case defined "pandering" for purposes of state law or made "pandering" a crime or evidence of a criminal violation.

Moreover, the California Supreme Court had recently rejected a prosecution claim that it should have been permitted to go to the jury on a "pandering" theory to try to obtain a conviction involving a magazine not obscene on its face. *People v. Noroff,* 67 C.2d 791, *supra.* In *Noroff,* the California Supreme Court rejected a claim that "pandering" evidence could be used to obtain an obscenity conviction, absent an enabling statute or a specific charge of pandering by the prosecution.

Thus, whatever behavior petitioner engaged in relative to the sale of the films in question could not, under *Noroff,* have had a bearing on whether the films were found obscene.

Even though California Penal Code Section 311 (a)(2) became law after the facts of this case happened, the trial court applied the terms of the section to petitioner's behavior. This denied petitioner due process and subjected him to an *ex post facto* application of the law.

Before the passage of P.C. 311(a)(2) dealers in sexual material could rely solely on the content of the material in evaluating whether to deal in it. Dealers had a vested defense: they could require the state to prove the material's utter lack of social importance. After §311(a)(2) became law, this vested defense was no longer the same. The prosecution, rather than being required to show, *from the material itself,* an utter lack of value, could now substitute the defendant's behavior as evidence of lack of value. Thus,

§311(a)(2) permitted convictions on less and different evidence than had been previously required.

When §311(a)(2) became law, dealers in sexual material lost their right to sell, disseminate or publicize such material any way they pleased. That right became severely limited. Important changes were brought about by 311(a)(2); and therefore its application, retroactively, to petitioner violated the proscription against *ex post facto* laws.

Critically, the retroactive application of §311(a)(2) to petitioner also deprived him of due process. In light of the California Supreme Court's holding in *Noroff,* and the absence of a "pandering" statute, defendant had no notice that he was under a duty to conform his behavior to some standard. *He simply did not know that his behavior could affect the question of the obscenity of the material.* As notice of proscribed behavior is a fundamental right, especially where free speech matters are involved, *Miller v. California, supra,* the application of §311(a)(2) to petitioner without prior notice to him constitutes a denial of due process. *Bouie v. Columbia,* 378 U.S. 347 (1964).

Certiorari should be granted to correct this serious constitutional error.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,
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July 12, 1976.

(Appendices Follow)

APPENDICES

Appendix A

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 Crim. 10255
(Sup. Ct. No. C 123)

People of the State of California,
Plaintiff and Respondent,
vs.
Roy Splawn,
Defendant and Appellant.

[Filed Mar. 29, 1976]

OPINION

This is a pornography case here on remand from the United States Supreme Court. Judgment of this court was entered on January 11, 1973, affirming appellant's conviction of violation of Penal Code section 311.2 (distribution of obscene material). Appellant's petition for writ of certiorari was granted. On January 7, 1974, judgment of this court was vacated and the cause remanded for consideration of this court in light of *Miller v. California,* 413 U.S. 15;

Paris Adult Theatre I v. Slaton, 413 U.S. 49; *Kaplan v. California,* 413 U.S. 115; *United States v. 12 200-ft. Reels of Super 8mm. Film,* 413 U.S. 123; *United States v. Orito,* 413 U.S. 139; *Heller v. New York,* 413 U.S. 483; *Roaden v. Kentucky,* 413 U.S. 496; and *Alexander v. Virginia,* 413 U.S. 836.

In *Miller,* the court arrived at standards for testing the constitutionality of state legislation regulating obscenity and it is against these standards that we are directed to consider the conviction of appellant. Although *Miller* involved the same statute of which appellant stands convicted (Pen. Code, § 311.2), the court remanded Miller's case considering that an existing state statute, while not couched in terms of the new requirements, might have been previously construed in such a way as to meet new specificity requirements.

This court ordered the recall of its remittitur on February 14, 1974, and on August 1, 1974, the parties having so stipulated, the submission of the cause was vacated to await the resolution of the constitutionality of the California statute, a question then again pending in the federal courts. The question has now been decided by the California Supreme Court in *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, in which it was held that Penal Code section 311 satisfied the requirement of specificity articulated in *Miller.* The Supreme Court ruled that section 311 "has been and is to be limited to patently offensive representations or descriptions of the specific 'hard core' sexual conduct given as examples in ***Miller I,***

i.e., 'ultimate sexual acts, normal or perverted, actual or simulated,' and 'masturbation, excretory functions, and lewd exhibitions of the genitals.' (413 U.S. at p. 25.) As so construed, the statute is not unconstitutionally vague." (16 Cal.3d at p. 81.)

We turn now to other issues raised by appellant Splawn in the appeal from the judgment convicting him of violation of section 311.2 of the Penal Code and since our previous opinion has been vacated, now affirm the judgment of the lower court for the reasons explained below:

Appellant was charged with selling to one Drivon two reels of movie film depicting sexual activity between two persons and three persons, including sexual intercourse, oral copulation and sodomy. Appellant at that time claimed that Penal Code section 311.2 is unconstitutional in that it violates the equal protection clause by exempting projectionists from its provisions while leaving clerks of bookstores subject to prosecution. Appellant, however, was not a clerk in a bookstore but rather its owner. The rule permitting a person to attack a statute only on constitutional grounds applicable to himself precludes appellant from raising this point. "The rule is well established . . . that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situatioin which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations. (Citations.) Petitioner has not

shown that the statute is being invoked against him in the aspects or under the circumstances which he suggests, and hence may not be heard to complain." (*In re Cregler,* 56 Cal.2d 308, 313; *People v. Maugh,* 1 Cal.App.3d 856, 862; compare *In re Davis,* 242 Cal. App.2d 645, 666.)

Appellant also attacks the constitutionality of this section on the additional ground that it goes beyond the area of legitimate state control. His position is that a state can only make criminal the dissemination of obscene material to juveniles, unwilling adults, or the "pandering" of such materials to prurient interest. This position was rejected by the California Supreme Court in *People v. Luros,* 4 Cal.3d 84. Here, as in *Luros,* evidence discloses commercial distribution of obscene material. The films in the present case were sold for $70.00.

In addition to his attack on the constitutionality of section 311.2, appellant contends that the jury was improperly selected, that the jury was improperly instructed, and that the evidence is insufficient to support the conviction. None of these contentions may be sustained.

Appellant contends that the jury was improperly selected in that prospective jurors were excluded from the venire because they had not been residents of the county for one year. Appellant argues that the residency requirement incorporated in Code of Civil Procedure section 198 deprives him of his constitutional right to trail by a jury selected from a cross-section of the entire community.

It is clear that certain groups united by common interests or characteristics may not be excluded from jury service. The United States Supreme Court has listed six bases on which groups may not be excluded —economic, social, religious, racial, political and geographical. (*Thiel v. Southern Pacific Co.,* 328 U.S. 217, 220.) It has recently been argued that exclusion in Code of Civil Procedure section 198 of persons under 21 was impermissible but this argument was rejected in *People v. Hoiland,* 22 Cal.App.3d 530, wherein the court pointed out that it was "'highly speculative whether the decisional outlook of such excluded persons would be different than that of persons a mere few years older.'" (*People v. Hoiland, supra,* at 536, quoting *King v. United States,* 346 F.2d 123, 124.) Such an observation is clearly pertinent with regard to the residence requirement. Persons residing in a county under one year come from either sex and from all racial, religious, political and economic groups. They comprise no cohesive group and their exclusion does not deprive a defendant of his right to be tried by a cross-section of the community.

Appellant also argues that the residence requirement arbitarily deprives a section of the community of their right to be considered for public service. He relies on recent cases wherein certain residency requirements for voting and pursuing elective office have been held to serve no legitimate state interest. (See *Keane v. Mihaly,* 11 Cal.App.3d 1037, one-year requirement for voting; *Camara v. Mellon,* 4 Cal.3d

714, three-year requirement to run for city council; *Zeilenga v. Nelson,* 4 Cal.3d 716, five-year requirement to run for board of supervisors.) These cases have reached the courts by way of petitions brought by persons denied the right to vote or run for office. Assuming *arguendo* that the residency requirement for service on a petit jury is subject to the same principles, the requirement should be challenged by those denied the right to serve. The defendant in a criminal case is not prejudiced by the denial of the right to serve on a jury by virtue of the residency requirement. His right is to be judged by a cross-section of the community and this right is not prejudiced by the residency requirement. Any error in this regard would not require reversal of this case.

Appellant argues that the jury was misinstructed as to the definition of the word "knowingly" as used in Penal Code section 311(e) and Penal Code section 311.2. The sale of the films occurred on November 7, 1969, and it is the law on that date which applies here.

Between 1961 and 1969, Penal Code section 311(e) provided that "knowingly" meant having knowledge that the matter was obscene. Prior to 1961, the prosecution had to eestablish that the defendant knew the content of the material but it was not necessary to show that he also knew it was obscene. (*People v. Harris,* 192 Cal.App.2d Supp. 887, 892, reversed on other grounds; *In re Harris,* 56 Cal.2d 879; *People v. Williamson,* 207 Cal.App.2d 839, 846, disapproved on other grounds, *In re Giannini,* 69 Cal.2d 563, 577.) In 1961 this section was amended to provide that the

defendant had to have knowledge that the matter was obscene. This was not interpreted to mean knowledge that a court would decide the matter was obscene. A reasonable construction was held to be that "[t]he defendant must have known the contents of the material, and must have been in some manner aware of its obscene character." (People v. Campise, 242 Cal.App.2d Supp. 905, 915.) Penal Code section 311(e) was amended, effective November 10, 1969, to provide that "'[k]nowingly' means being aware of the character of the matter . . . ."

The instructions as to knowledge given in the case at hand are as follows: "The word 'knowingly' as used in the context of Penal Code Section 311.2, means that each of the defendants must have known the contents of the material, and must have been in some manner aware of its obscene character. It is not necessary to construe 'knowledge that the matter is obscene' as meaning that each of the defendants knew that a Court would decide the matter to be legally obscene, . . .

"Nor is direct evidence that each of the defendants has personally viewed the films in question necessary, for knowledge may be established by circumstantial evidence."

The jury was instructed properly either under the statute as it stood prior to 1969 (*People v. Campise, supra; People v. Pinkus,* 256 Cal.App.2d Supp. 941, 949-950) or under its later amendment. There was no necessity, as appellant contends, to repeat the definition of obscenity and require the jury to find ap-

pellant had knowledge of the presence of all elements of such a definition.

Appellant also complains of the following instructions: "In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the mature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled in [sic] a matter for you, the Jury, to determine.

* * *

"Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter [is] utterly without redeeming social importance."

These instructions conform to the language of Penal Code section 311(a)(2) which was added to the statute in the 1969 amendment. In 1966 the Supreme Court in *Ginzburg v. United States,* 383 U.S. 463 recognized the probative value of evidence a defendant was exploiting, for commercial purposes, material openly advertised to appeal to the erotic interest

of his customers, an activity referred to as "pandering." In 1967 the California Supreme Court in *People v. Noroff,* 67 Cal.2d 791, 793, pointed out that the Legislature had not created the crime of pandering. The court did not, however, disapprove of any use of evidence of pandering for its probative value on the issue of whether the material was obscene. It merely rejected the concept of pandering of nonobscene material as a separate crime under the existing laws of California.

The 1969 amendment did not make pandering of nonobscene material a separate crime. Rather it clarified the use to which evidence of pandering might be made in the determination of whether one of the requirements of obscenity existed, *i.e.,* lack of any redeeming social value. It did not aggravate the punishment for the offense, create a crime which did not previously exist, or deny the accused a vested defense. The application of the amendment to the appellant's trial does not contravene the constitutional doctrine prohibiting ex post facto laws. (See *People v. Bradford,* 70 Cal.2d 333, 343-344, fn. 5; *People v. Snipe,* 25 Cal.App.3d 742, 747-748.)

Appellant also contends that there is no substantial evidence to support a finding that the films in question went beyond the "customary limits of candor" or that the predominant appeal of the films was to the "prurient interest" of the average person, as required by section 311 et seq. of the Penal Code.

" 'Obscene matter' means matter, taken as whole, the predominant appeal of which to the average per-

son, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." (Pen. Code, § 311(a); see *Roth v. United States,* 354 U.S. 476, 488-489.)

The test of community standards applies to the questions of whether the predominant appeal of the material is to "prurient interest" and also to the question of whether the material exceeds the "customary limits of candor." (*In re Giannini, supra,* 69 Cal.2d 563, 572-574.) A statewide rather than a national standard is applicable to judge community standards where the subject matter is "obviously not intended for nationwide dissemination." (*In re Giannini, supra,* at 579.) The prosecution, in order to bear its burden of proof, must introduce evidence of community standards through expert testimony, since the judge or jury, which makes the initial factual determination, and later the appellate court, which must reach an independent decision as to the obscenity of the material (*Zeitlin v. Arnebergh,* 59 Cal.2d 901, 908-909), do not compose a cross-section of the community. (*In re Giannini, supra,* at 574-576.)

To establish that these films exceeded the contemporary community standards of candor in California, the People presented Officer Barber of the Los Angeles Police Department. The trial court ruled that he

was "qualified to give his opinion in the area of obscenity, the general area of obscenity." He had viewed the films in question as well as other films brought to the attention of his department during the period in question. He testified that the depiction on film of close-ups of sexual intercourse, oral copulation, sodomy and masturbation were beyond the customary limits of candor in the State of California. There was no evidence to the contrary. A viewing of the films indicates they do depict these activities.

Appellant objects to the testimony of Officer Barber as an expert witness but it is clear that this officer's interviews and studies of interviews for a state survey, the questioning of laymen, and participation in civic panels were directed toward ascertaining the standards of the community in the area of obscenity. We have concluded that the court did not err in admitting this testimony and in instructing the jury regarding the weight to be given it.

The other expert witness for the prosecution was Dr. Peschau who testified that he had experience in evaluating the psychologically healthy, as well as the mentally ill and sexually disturbed. He testified that, in his opinion, the predominant appeal of the films was to a prurient interest. Appellant's objections to his qualifications and opinion go to the weight of his testimony.

The fact that Dr. Peschau and Officer Barber expressed their opinions in terms of ultimate facts does not render their testimony inadmissible. (Evid. Code, § 805; *People v. Cole,* 47 Cal.2d 99, 105.) The jurors

were instructed that they were not bound by the testimony of the experts but should give it the weight to which they found it to be entitled and disregard it if they found it to be unreasonable.

We have viewed the movie films and have concluded that the jury did not err in its finding of obscenity.

The judgment is affirmed.

Brown (H. C.), J.

We concur:

Draper, P. J.

Caldecott, J.*

*Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

Appendix B

CLERK'S OFFICE, SUPREME COURT

4250 State Building
San Francisco, California 94102
May 26, 1976

Dear Sir: I have this day filed Order

HEARING DENIED

In re: 1 Crim. No. 10255
People

vs.

Splawn

Respectfully,
G. E. Bishel,
Clerk.

APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN, *Petitioner*

VS.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Three

---

Petition for Certiorari Filed July 31, 1976
Certiorari Granted December 6, 1976

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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Subject Index

DOCKET ENTRIES

In the Superior Court of the State of California
in and for the County of San Mateo

No. C 123

The People of the State of California,
Plaintiff,
vs.
Roy Splawn,
Defendant.

CLERK'S TRANSCRIPT

Minutes Civil and Criminal, Department No. 10,
Volume 199, Page 200

April 9, 1970—Each defendant was arraigned, through counsel was handed a copy of the Information, waived its reading and advice as to rights and waived time for trial. At request of defendants, time to plead continued to April 30, 1970, at 9:00 A.M. (or hearing on demurrer if one is filed).

All defendants on bail.

May 4, 1970—Each defendant entered a plea of not guilty to each count and waived time for trial.

Ordered that a Jury Trial be set for July 27, 1970, at 9:00 A.M. and a pre-trial conference be set for July 17, 1970, at 2:00 P.M.

Defendants' motions under Sec. 995 and 1538.5 P.C. set for June 17, 1970, at 2:00 P.M.

All defendants on bail.

July 13, 1970—Motion under Section 995.

June 7, 1971—The following named jurors who had been heretofore summoned, appeared and answered to their names: . . .

. . .

Defendants satisfied.

People satisfied.

1. Carl F. Spiess
2. Samuel T. Bentley
3. Alice O. Liechti
4. Robert A. Corrie
5. Anne G. Ward
6. Colin A. Cooke
7. Sandra J. Asher
8. Nanna B. Hetzner
9. Philip W. Mayo
10. Shirley Y. Carson

11. William E. Crowley
12. Otis A. Sturdivant, Jr.

The above twelve jurors were sworn that they would well and truly try the case now at issue before the Court and a true verdict render according to the evidence.

Alternate Juror James R. Brown was drawn from the Jury Box. . . .

Alternate Juror Hugh B. Hacke was sworn that he would well and truly try the case now at issue before the Court and a true verdict render according to the evidence.

11:15 A.M. . . . Opening statement to court and jury was made by H. Kelly Ogle, Deputy District Attorney.

Defendants reserved their rights to this time, as to their opening statement to Court and jury, until the People had rested their case.

11:25 A.M. Out of the presence of the jury, a motion to strike a portion of Count II of the Information, was made by Richard Chesney, attorney for Defendants Splawn. It is ordered that said motion be granted.

11:35 A.M. . . . The Clerk at this time read the Information to the jury.

Armand Richard Drivon was sworn and testified as a witness on behalf of the People. . . .

2:00 P.M. . . . Armand Richard Drivon was recalled to the stand and testified as a witness on behalf of the People.

People's Exhibit #3 (paper bag) was introduced into evidence.

2:25 P.M. Out of the presence of the jury, and Defendants waiving appearance, a motion to strike on behalf of the Defendants Splawn, was made by Richard Chesney, attorney for Defendants Splawn.

It is ordered that the motion to strike be denied.

A motion to strike all testimony of the witness Drivon was made by Richard Chesney, attorney for the Defendants Splawn. It is ordered that said motion be denied.

A motion for discovery pertaining to certain tapes was made by Richard Chesney, attorney for said defendants. It is ordered that said motion be granted—if said tapes are in existence.

A motion for dismissal on behalf of Defendants Splawn was made by Richard Chesney, attorney for the Defendants Splawn. It is ordered that said motion be denied.

2:45 P.M. . . . Armand Richard Drivon was recalled to the stand and testified on behalf of the People.

People's Exhibit #4 (41 colored photos) was introduced into evidence. . . .

3:32 P.M. . . . Armand Richard Drivon was recalled to the stand and testified as a witness on behalf of the People.

Police Sgt. Herbert G. Weiss was sworn and testified as a witness on behalf of the People.

People's Exhibits #1, #2 and #3, formerly introduced for identification only, now ordered into evidence.

4:15 P.M. . . . Out of the presence of the jury, a hearing was conducted at this time with the defendants and their counsel present in court.

Police Officer Richard Franklin Hamilton was sworn and testified as a witness on behalf of the People.

Defendants' Exhibit A-1 (Xerox copy of taped telephone call), A-2 (Xerox copy of taped telephone call) were introduced for identification only.

Margie E. Troy was sworn and testified as a witness on behalf of the People.

Defendants' Exhibits A-1 and A-2, formerly introduced for identification only now ordered into evidence.

A motion to dismiss the Information on behalf of the Defendants Splawn was denied.

People's Exhibits 5-A and 5-B formerly introduced for identification only, now ordered into evidence.

It is ordered that defendants remain out on present bail.

June 11, 1971— . . . 10:10 A.M. . . . Police Officer Austin Barber was sworn and testified as a wit-

ness on behalf of the People. People's Exhibit #6 (obscenity survey) was introduced for identification only. . . .

11:23 A.M. . . . Police Officer Austin Barber was recalled to the stand and testified as a witness on behalf of the People.

12:00 Court recessed, all jurors were admonished by the Court.

2:05 P.M. Court reconvened, stipulated that all jurors, defendants and their counsel were present in court.

Police Officer Austin Barber was recalled to the stand and testified as a witness on behalf of the People. . . .

3:24 P.M. . . . Austin Barber was recalled to the stand and testified as a witness on behalf of the People.

4:30 P.M. . . . It is ordered that the above entitled trial by jury be continued to June 14, 1971, at 9:30 A.M.

June 14, 1971—. . . 1:30 P.M. Court convened. . . . Armand Drivon was called and testified on behalf of Plaintiff on cross-examination; Officer Drivon having been previously sworn. . . .

3:25 P. M. Court reconvened. It was stipulated that all jurors, alternate and defendants present.

Officer Drivon was recalled to the witness stand to testify further herein.

4:00 P.M. Witness excused.

Marie Tiernan was sworn and testified as a witness on behalf of the People.

People's Exhibits No. 7 (copies of documents re License of Golden Gate Book Store), No. 8 (photocopies of telephone record (bill), were admitted in evidence).

4:08 P.M. Witness excused. Court adjourned. . . .

Out of the presence of the jury, Court took up the admissibility of People's Exhibit No. 4 (colored photos). Argument on the same. People's Exhibit No. 4 is admitted.

4:23 Court adjourned.

June 15, 1971—. . . H. Kelly Ogle, Deputy District Attorney for the People Richard Chesney, Attorney for the Defendants Splawn William D. Esselstein, Attorney for Defendant Esselstein. It was stipulated that all jurors and alternate juror were present.

9:30 A.M. Court convened. All defendants present. . . .

The jury was excused in order for legal arguments on question asked by Mr. Ogle.

The jury was recalled to the courtroom. Counsel and defendants present.

Dr. John Peschau resumed testifying. . . .

11:17 A.M. Court reconvened. All jurors and alternate, counsel and defendants are present.

Dr. John Peschau resumed testifying.

12:00 Dr. Peschau was excused. The jury was executed and departed the courtroom for noon recess. Counsel, all defendants and court personnel remain. Mr. Chesney's motion to strike Dr. Peschau's testimony, in which Mr. Esselstein joined, was denied. . . .

2:04 P.M. . . . People rested.

Attorney Esselstein moved for acquittal, under Sec. 1118.1 PC, of defendant Esselstein, which was denied.

Mr. Chesney's motion for acquittal, under Sec. 1118.1 PC, of defendants Splawn, was denied.

2:17 PM Court recessed. 2:18 PM Court reconvened. All jurors, alternate, defendants and counsel present. Mr. Chesney waived opening statement. Mr. Esselstein made an opening statement to the court for defendant Esselstein.

2:23 PM Jimmy Brogden was called by Mr. Chesney, was sworn and testified.

Defendants' Exhibit B (blue carpet) was admitted in evidence. . . .

3:31 PM Jimmy Brogden resumed testifying.

4:03 Mr. Brogden was excused. . . .

June 16, 1971—. . . 9:36 AM . . . Vernie Walker was called by Mr. Chesney, was sworn and testified.

10:35 Mrs. Walker was excused. . . .

10:55 Court reconvened. All jurors, alternate, defendants and counsel are present.

Roy Splawn was sworn and testified in his own behalf.

11:43 Counsel and court personnel retired to chambers, out of presence and hearing of the jury, for argument. Jurors instructed to remain in place.

11:50 Counsel and court personnel returned to the courtroom, all jurors, alternate, defendants and counsel present.

Roy Splawn resumed testifying. . . .

2:04 PM Court reconvened. Roy Splawn resumed testifying.

2:30 PM Don Splawn was sworn and testified in his own behalf. . . .

3:32 PM Court reconvened. Don Splawn resumed testifying.

4:00 PM Robert Esselstein was sworn and testified in his own behalf.

4:38 PM Mr. Esselstein rested. The jury departed, after being admonished by the court. The further trial of this case is continued to 10 AM, June 18, 1971.

4:41 PM Outside the presence of the jury, all defendants and counsel present. At Mr. Chesney's motion, under Sec. 775 Evidence Code, Deputy ..... was ordered to be present (thru Mr. Ogle).

4:44 PM Mr. Esselstein's motion to acquit defendant Esselstein was denied.

4:45 PM Court recessed. All counsel shall be present at 8:30 AM, June 18, 1971, to review proposed instructions.

June 18, 1971—. . . H. Kelly Ogle, Deputy District Attorney, for the People Richard Chesney, attorney for the defendants Splawn William D. Esselstein, attorney for defendant Esselstein

10:53 AM The reporter and clerk joined the judge and all counsel in chambers, out of the hearing of the jury, where review of instructions had been taking place since earlier this morning. Statements were made by the court and counsel on the record with reference to the instructions. All counsel waived presence of defendants at this conference. Stipulated that the court may give instructions orally.

11:00 AM The in-chambers conference of court and counsel ended.

11:12 AM—Court convened. . . . Jerry Faulkner was called by Mr. Chesney, was sworn and testified.

11:55 Defendants' Exhibit C (piece of blue rug) was admitted. Mr. Chesney rested. Court recessed at 2 PM. All jurors admonished by the court.

2:07 PM Court reconvened. All jurors, alternate, defendants and counsel are again present. The People moved to dismiss charges against defendant Robert Esselstein.

2:09 PM The court instructed the jury to remain in their proper places. The judge, reporter, clerk and all counsel had an in-chambers conference out of hearing of the jury. Defense attorneys waive presence of defendants Splawn.

2:32 PM The Court, reporter, clerk and all attorneys re-entered the courtroom, all defendants, jurors and alternate are again present.

People's motion to dismiss for insufficient evidence charges against defendant Esselstein was granted and these charges are dismissed.

With the permission of the Court, Mr. Chesney re-opened his case.

2:34 PM Defendant Esselstein was called by Mr. Chesney and testified further.

2:41 Attorney William D. Esselstein was called by Mr. Chesney, was sworn and testified.

2:47 Mr. Chesney rested. Defendant and attorney Esselstein withdrew. Bail of defendant Esselstein exonerated.

2:48 PM Mr. Ogle made People's opening argument to Court and jury.

3:40 Court recessed. All jurors admonished by the Court.

4:00 PM Court reconvened. All jurors, alternate, defendants and counsel are present. Mr. Chesney made defendants' argument to Court and jury.

4:33 Court adjourned. The further trial of this case is contined to 9:00 A.M., June 21, 1971. All jurors admonished.

June 21, 1971—. . . H. Kelly Ogle, Deputy District Attorney for the People Richard Chesney, attorney for defendants Splawn.

9:19 AM Court convened. All jurors, alternate, defendants Splawn and counsel are present in their proper places. Mr. Chesney resumed argument to Court and Jury.

10:58 AM Court recessed to 11:15 AM. Jurors admonished.

All jurors having departed the courtroom, defendants and counsel present. A short discussion as to the remaining time elements in this case was had.

10:59 AM Court recessed.

11:20 AM Court reconvened. All jurors, alternate, defendants Splawn and counsel are present. Mr. Chesney resumed argument to court and jury.

11:34 AM Mr. Ogle made People's closing argument to Court and jury.

11:45 AM The Court orally gave instructions to the jury.

12:38 PM Deputy Sheriff (Bailiff) Kenneth Evans took charge of the jury after having been sworn to do so, and the jury retired for deliberation.

12:39 PM Counsel stipulated, and defendants agreed, that the alternate juror may leave under appropriate instructions of the Court and be on call. The alternate juror was admonished by the Court.

12:42 PM Stipulated the jury may go to and return from lunch without being brought into court.

4:45 The jury returned to the courtroom—all jurors (except the alternate juror) defendants Splawn and attorneys present. The court re-read requested instructions on entrapment. Tape Recording (People's Exhibit 5-B) was replayed to the jury; and counsel stipulated the reporter need not report this recording again. The reporter read requested testimony and the Court gave instructions requested.

6:10 PM The jury retired for further deliberation. Out of hearing and presence of the jury, defendants' attorney objected to the instructions.

6:30 PM The jury returned to the courtroom, all jurors, defendants and attorneys present. Court adjourned to 9:15 AM, June 22, 1971. All jurors admonished. Stipulated the jury may retire then to the jury room for deliberation without returning into court.

June 22, 1971—. . . 9:18 AM Pursuant to stipulation of June 21, 1971, all members of the jury are present and retired directly to the jury room for further deliberation in charge of Deputy Sheriff Kenneth Evans.

10:30 AM The jury returned to the courtroom, all jurors (except the alternate) defendants Splawn and attorneys present, replied in the affirmative thru the foreman to the Court's inquiry whether the jury had agreed upon verdicts, and rendered the following verdicts:

In the Superior Court of the State of California, in and for the County of San Mateo

The People of the State of California, Plaintiff, vs. Roy Splawn, Don Splawn and Robert Essenstein, Defendants, No. C 123

Verdict: We, the jury in the above entitled cause, find the defendant, Roy Splawn, not guilty of the crime of conspiracy, in violation of Section 182.1/311.2, Penal Code, California as charged in Count I of the Information Filed Herein.

Dated: 22 June, 1971, Samuel T. Bentley, Foreman.

* * *

In the Superior Court of the State of California, in and for the County of San Mateo.

The People of the State of California, Plaintiff, vs. Roy Splawn, Don Splawn and Robert Esselstein, Defendants, No. C 123

Verdict: We, the jury in the above entitled cause, find the defendant, Don Splawn, not guilty of the crime of conspiracy, in violation of Section 182.1/311.2, Penal Code, California, as charged in Count I of the Information Filed Herein.

Dated: 22 June, 1971, Samuel T. Bentley, Foreman.

* * *

In the Superior Court of the State of California, in and for the County of San Mateo

The People of the State of California, Plaintiff, vs. Roy Splawn, Don Splawn and Robert Essenstein, Defendants, No. C 123

Verdict: We, the jury in the above entitled cause, find the defendant, Roy Splawn, guilty of the crime of distributing obscene matter, in violation of Section 311.2, Penal Code, California, as charged in Count II of the Information Filed Herein.

Dated: 22 June 1971, Samuel T. Bentley, Foreman.

* * *

In the Superior Court of the State of California, in and for the County of San Mateo

The People of the State of California, Plaintiff, vs. Roy Splawn, Don Splawn and Robert Esselstein, Defendants, No. C 123

Verdict: We, the jury in the above entitled cause, find the defendant, Don Splawn, not guilty of the crime of distributing obscene matter, in violation of Section 311.2 Penal Code, California, as charged in Count II of the Information Filed Herein.

Dated: 22 June 1971, Samuel T. Bentley, Foreman

* * *

The court ordered the clerk to read and record the verdicts. The clerk read the verdicts to the jury and recorded them. On motion by Mr. Chesney, the jury was polled as to the guilty verdict against defendant Roy Splawn. Result: Yes-12 (unanimous).

10:37 AM The court thanked, excused and released from admonitions the jury.

Bail exonerated as to defendant Don Splawn. Roy Splawn, thru counsel, waived time for arraignment for judgment and formal arraignment for judgment, stated there is no legal cause why judgment should not be pronounced and moved for probation. Defendant waiving time, motion for probation and pronouncement of judgment is continued to July 23, 1971 at 9:00 AM in this Department. Later, the date of July 23, 1971, was changed to July 26, 1971, at the same time and place, with consent of counsel.

Roy Splawn may remain on bail.

1 Crim. No. 10,255
In the Court of Appeal
State of California

First Appellate District

Division Three

C 123 7-29-71 Conspiracy

People of the State of California,
Plaintiff and Respondent,
vs.
Roy Splawn,
Defendant and Appellant.

San Mateo County
Judge Honorable Gerald E. Ragan

Evelle J. Younger, Attorney General
Assistant Deputy

Wells & Chesney, Inc.
By: Richard L. Chesney, Esq.
2000 Center Street, Suite 310
Berkeley, Calif. 94704

Nov 26 1971 Filed record on appeal, C1, R4

Jan 20 1972 Appellant notified pursuant to Rule 7a

Mar 1 1972 Filed appellant's opening brief

Jun 30 1972 Filed respondent's brief

Oct 17 1972 Cause argued and submitted

Jan 11 1973 Opinion: The judgment is affirmed. Brown (H. C.), J. We concur: Draper, P.J., Caldecott, J. (W. P.)

Feb 16 1973 Petition for hearing filed in Supreme Court

Mar 8 1973 Petition for hearing denied in Supreme Court

Mar 13 1973 Remittitur to County Clerk

Feb 13 1974 Filed certified copy of Supreme Court order granting petition for writ of certiorari with directions.

Feb 14 1974 By the Court:

The mandate of the United States Supreme Court having been received and filed, vacating the judgment of this court and remanding the cause to this court for further consideration, the remittitur heretofore issued March 13, 1973 is ordered recalled.

Feb 28 1974 Remittitur returned and cancelled

May 2 1974 Filed respondent's brief

May 10 1974 Filed appellant's opening brief

May 21 1974 Cause argued and submitted

Jul 29 1974 Filed stipulation vacating submission of cause.

Aug 1 1974 Filed order by the court pending further order of this court and ..... having so stipu-

lated order submitting cause for decision on 5/21/74

Mar 29 1976 Filed order submitting cause

Mar 29 1976 Judgment offered. Brown (H.) J. We concur, ... P. J. Caldecott, J. assigned Draper, (c.n.p.) See 10259

Apr 15, 1976 Filed petition for rehearing

Apr 28 1976 Filed order denying petition for rehearing

Apr 29 1976 Petition for hearing filed in Supreme Court

May 26 1976 Petition for hearing denied in Supreme Court

Jun 1 1976 Remittitur to County Clerk

1 Crim. No. 10,255 (Div. Three)

In the Supreme Court
of the
State of California

People, etc.,
Plaintiff and Respondent,
vs.
Roy Splawn,
Defendant and Appellant.

County of San Mateo (C 123)
Judge Gerald E. Ragan

Office of the Attorney General
6000 State Bldg., S.F.

Wells & Chesney, Inc.
125-12th St., Suite 157
Berkeley, Calif. 94607

1-11-73 J affirmed NP

Feb 16 1973 Filed Applt's petition for hearing (due 3-12-73)

Mar 8 1973 Hearing denied

3-13-73 Remittitur issued

2-14-74 By the Court: The mandate of the United States Supreme Court having been received and filed, vacating the judgment of this court and remanding the cause to this court for further consideration, the remittitur heretofore issued March 13, 1973 is ordered recalled.

3-29-76 J affirmed NP

4-28-76 Reh'g denied

Apr 29 1976 Filed applt's petition for hearing (due 5-28-76)

May 26 1976 Hearing denied

6-1-76 Remittitur issued

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

"The petition for a writ of certiorari is granted limited to Questions 1, 2, 3 and 4, presented by the petition."

Very truly yours,
Michael Rodak, Jr., Clerk
By June M. Hoffmann
(Miss) June M. Hoffmann
Assistant Clerk

CLERK'S TRANSCRIPT

---

[5] Keith C. Sorenson, District Attorney
County of San Mateo
Hall of Justice & Records
Redwood City, California
Telephone: 369-1441

Filed
April 3, 1970
Marvin Church, County Clerk
By /s/ Mary Bartlett
Deputy Clerk

(E) (Indexed)

In the Superior Court of the State of California
In and For the County of San Mateo

No. C 123

The People of the State of California,
Plaintiff,
vs.
Roy Splawn, Don Splawn and
Robert Esselstein,
Defendants.

INFORMATION

The District Attorney of the County of San Mateo hereby accuses Roy Splawn, Don Splawn and Robert Esselstein, and each of them, of the crime of felony, to wit: Violation of Section 182.1/311.2 of the Penal

Code of the State of California, and of the crime of misdemeanor, to wit: Violation of Section 311.2, Penal Code, State of California, as follows:

Count I—Violation of Section 182.1/311.2, Penal Code, California

That the said Roy Splawn, Don Splawn and Robert Esselstein, and each of them, on and between the 1st day of August, 1969, and the 7th day of November, 1969, at and in the County of San Mateo, State of California, did wilfully, unlawfully and feloniously commit the crime of conspiracy **[6]** in violation of Section 182 of the Penal Code of the State of California, and at the time and place last aforesaid, did conspire, combine, confederate and agree together to commit a crime, to wit: Violation of Section 311.2 of the Penal Code, State of California.

First Overt Act—That pursuant to the above conspiracy, combination and agreement, and to carry out the objectives thereof, the said defendant, Don Splawn, on or about August 1, 1969, on the premises known as the Golden Gate Book Store, 735 El Camino Real, Redwood City, offered to distribute to Armand Drivon motion picture films depicting heterosexual and homosexual activities.

Second Overt Act—That pursuant to the above conspiracy, combination and agreement, and to carry out the objectives thereof, the said defendant, Don Splawn, on or about November 5, 1969, in a telephone conversation with Armand Drivon agreed to meet at the aforementioned premises to discuss the purchase

of films by Armand Drivon of a type and character described in the first overt act.

Third Overt Act—That pursuant to the above conspiracy, combination and agreement, and to carry out the objectives thereof, Armand Drivon on or about November 5, 1969, on the aforementioned premises discussed with defendant, Don Splawn, the delivery of said films by defendant, Roy Splawn, to the aforementioned premises.

Fourth Overt Act—That pursuant to the above conspiracy, [7] combination and agreement, and to carry out the objectives thereof, the said defendant, Roy Splawn, on or about November 5, 1969, at the aforementioned premises, offered to sell said films on November 7, 1969, at the aforementioned premises to Armand Drivon and quoted the price of said films.

Count II—Violation of Section 311.2, Penal Code, California (Misdemeanor)

That the said Roy Splawn, Don Splawn and Robert Esselstein, and each of them, on or about November 7, 1969, at and in the County of San Mateo, State of California, did wilfully and unlawfully violate Penal Code Section 311.2, to wit: Distribute to Armand Drivon two reels of obscene 8 mm colored motion picture film depicting human beings in the act of sexual intercourse and acts of oral copulation.

Dated: April 3, 1970.

Keith C. Sorenson,
District Attorney
By /s/ Wilbur Johnson for
John E. O'Leary, Deputy

VERDICTS

[219] Filed
June 22, 1971
Marvin Church, County Clerk
By /s/ William G. Sitnek
Deputy Clerk

(E)

In the Superior Court of the State of California
In and For the County of San Mateo

No. C 123

The People of the State of California,
Plaintiff,

vs.

Roy Splawn, Don Splawn and
Robert Esselstein,
Defendants.

VERDICT

We, the Jury in the Above Entitled Cause, find the defendant, Roy Splawn, Not Guilty
of the crime of conspiracy,
in violation of Section 182.1/311.2,
Penal Code, California,
as charged in Count I of the Information Filed Herein.

Dated: 22 June 1971

/s/ Samuel T. Bentley
Foreman

[220] Filed
June 22, 1971
Marvin Church, County Clerk
By /s/ William G. Sitnek
Deputy Clerk

(E)

In the Superior Court of the State of California
In and For the County of San Mateo

No. C 123

The People of the State of California,
Plaintiff,
vs.
Roy Splawn, Don Splawn and
Robert Esselstein,
Defendants.

VERDICT

We, the Jury in the Above Entitled Cause, find the defendant, Roy Splawn, Guilty
of the crime of distributing obscene matter,
in violation of Section 311.2,
Penal Code, California,
as charged in Count II of the Information Filed Herein.

Dated: 22 June 1971

/s/ Samuel T. Bentley
Foreman

[221] Filed
June 22, 1971
Marvin Church, County Clerk
By /s/ William G. Sitnek
Deputy Clerk

(E)

In the Superior Court of the State of California
in and for the County of San Mateo

No. C 123

The People of the State of California,
Plaintiff,
vs.
Roy Splawn, Don Splawn and
Robert Esselstein,
Defendants.

VERDICT

We, the Jury in the Above Entitled Cause, find the defendant, Don Splawn, Not Guilty
of the crime of conspiracy,
in violation of Section 182.1/311.2,
Penal Code, California,
as charged in Count I of the Information Filed Herein.

Dated: 22 June 1971

/s/ Samuel T. Bentley
Foreman

[222] Filed
June 22, 1971
Marvin Church, County Clerk
By /s/ William G. Sitnek
Deputy Clerk

(E)

In the Superior Court of the State of California
in and for the County of San Mateo

No. C 123

The People of the State of California,
Plaintiff,
vs.
Roy Splawn, Don Splawn and
Robert Esselstein,
Defendants.

VERDICT

We, the Jury in the Above Entitled Cause, find the defendant, Don Splawn, Not Guilty
of the crime of distributing obscene matter,
in violation of Section 311.2,
Penal Code, California,
as charged in Count II of the Information Filed Herein.

Dated: 22 June 1971

/s/ Samuel T. Bentley
Foreman

SENTENCE AND JUDGMENT

[223] Minutes Civil and Criminal, Department No. 12, Volume 212, Page 508

(Title of Court)

July 26, 1971

Present: Hon. Gerald E. Ragan, Judge
John N. Thomas, Clerk
Constantine Constant, CSR

(Title of Cause)

Report of Probation Officer, Motion for Probation and Time for Sentence.

H. Kelly Ogle, Deputy District Attorney for the People.

Richard Chesney, Attorney for the Defendant
Defendant present in court with counsel.

The report of the Probation Officer was read by the court and ordered filed.

The defendant waived formal arraignment for judgment, and there being no legal cause to show why judgment should not be pronounced at this time, it is ordered that the motion for probation be denied. It is ordered that the defendant be sentenced to the County Jail for the period of ninety-one days (91), with one day jail sentence suspended, and it is further ordered that the defendant pay the fine in the sum of $1,000.00 plus State assessment.

It is further ordered that a stay of execution be granted to the defendant to July 30, 1971 at 10 AM. It is further ordered that if an appeal is made, an appeal bond is hereby fixed at $1,250.00.

Defendant to remain on present bail.

[224] Filed
August 11, 1971

Marvin Church, County Clerk
By /s/ Mary Bartlett
Deputy Clerk

(E)

In the Superior Court of the State of California
in and for the County of San Mateo

No. C 123 Department 12 Present: Hon. Gerald E. Ragan

Date: July 26, 1971 Convicted of crime of Viol. Sec. 311.2, Penal Code, California (Misdemeanor)

People of the State of California,
Plaintiff,

vs.

Roy Lee Splawn,
Defendant.

JUDGMENT AND COMMITMENT TO COUNTY JAIL

This cause came on regularly this day for judgment. The District Attorney, Keith C. Sorenson, by Deputy H. Kelly Ogle, with the said defendant, Roy Lee Splawn, and his counsel, Richard Chesney came into Court; and

The said defendant having been duly arraigned for judgment by the Court, and having been asked if he had any legal cause to show why judgment

should not be pronounced against defendant, to which defendant replied that he had none;

And no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment:—

[225] That whereas said defendant has been convicted of the crime of Violation of Section 311.2, Penal Code, California: and whereas defendant has refused probation:—

It Is Therefore Ordered, Adjudged and Decreed that the said defendant be and he is hereby sentenced to serve ninety-one (91) days in the County Jail, with one day suspended, and pay a fine in the sum of $1,000.00 plus $250.00 penalty assessment, the execution of this sentence is stayed to July 30, 1971, at the hour of 10:00 A.M. Defendant is admitted to bail on appeal in the amount of $1,000.00 plus $250.00 penalty assessment. In the event said bail is posted, execution of the sentence is stayed pending of determination on appeal.

Further, This Is To Command You, the Sheriff of the County of San Mateo, to take and safely keep and imprison defendant in said County Jail for the term of

Ninety-One (91) Days, with One (1) Day Thereof Suspended.

The said Defendant was then remanded to the custody of the Sheriff.

[227] (Title of Court and Cause)

(E)

(Endorsed) Filed
July 29, 1971
Marvin Church, County Clerk
By /s/ Sara Bradley
Deputy Clerk

NOTICE OF APPEAL

To the Clerk of the above-entitled Court:

The Defendant Roy Splawn appeals from the Judgment entered in this matter on July 26, 1971.

Dated: 7/28/71

Wells & Chesney, Inc.
By /s/ Richard L. Chesney,
Richard L. Chesney, Esq.

OPINION OF COURT OF APPEAL

The opinion of the California Court of Appeal of March 29, 1976 is contained in Appendix A of the Petition for Certiorari.

The denial of the Petition for Hearing in the California Supreme Court is contained in Appendix B of the Petition for Certiorari.

Instructions relative to obscenity

[878] . . . California Penal Code Section 311.2 provides that every person who knowingly distributes or sells obscene matter to others is guilty of a misdemeanor. Matter within the meaning of this statute includes movies or films.

In the crime charged in count two of the information, violation of Penal Code Section 311.2, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, such as knowingly distribute obscene motion pictures to others, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful.

The word "knowingly" as used in the context of Penal Code Section 311.2, means that each of the defendants must have known the contents of the material, and must have been in some manner aware of its obscene character. It is not necessary to construe "knowledge that the matter is obscene" as meaning that each of the defendants knew that a Court would decide the matter to be legally obscene, nor is it direct evidence that each of the defendants has personally viewed the films in question necessary for knowledge let me repeat that. Nor is—when I say "let me repeat it, I got the emphasis in the wrong place here, the punctuation."

[879] Nor is direct evidence that each of the defendants has personally viewed the films in question necessary, for knowledge may be established by circumstantial evidence.

The word "distribute" means the transfer of possession of obscene matter whether or not it was purchased or paid for with money or with some other form of consideration.

As used in these instructions, "obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor in description or representation of such matters, and is matter which taken as a whole is utterly without redeeming social importance.

Thus, for the matter to be obscene, each of the three following factors must be found to exist beyond a reasonable doubt:

1. It is matter taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to the prurient interest, that is, the shameful or morbid interest in nudity, sex, or excretion; and

2. It is matter which taken as a whole goes substantially beyond the customary limits of candor in description or representation of such matter; and

3. It is matter which taken as a whole is utterly without redeeming social importance.

The average person is, of course, a hypothetical person. [880] The phrase means a person with an average interest in and attitude toward sex; not a libertine and not a prude, not a person who is preoccupied with sex and not a person who rarely if ever thinks about sex; not a person who thinks sex is the most important thing to be discussed and not a person who thinks sex should never be discussed. The phrase means a normal individual of average sex instincts; not one who is undersexed, not one who thinks sex is the most important factor in life, and not one who is afraid of sex or ignorant of sex or bored by sex. In short, the phrase "average person" means a normal, healthy, average adult man or woman with normal, healthy, average attitudes, instincts and interests concerning sex.

The contemporary standard to which the law makes reference is set by what is, in fact, acceptable to the community as a whole, not by what some person or persons may believe the community as a whole ought to accept. Ascertainment of the standard must be based upon an objective determination of what affronts and is unacceptable to the community as a whole. It must not be based upon a merely subjective reflection of the tastes or the moral outlook of the individual jurors.

You are instructed that for purposes of determining the obscenity of the material here in question, the relevant community is the entire State of California.

In determining whether a particular matter affronts contemporary community standards relating to the description or representation of sex, you may take into account the nature of the particular form of expression involved. For example, a motion picture [881] depicting sexual scenes may transcend contemporary community standards before a frank description of the same scene in written words would.

A "prurient interest" is an interest in sex, nudity or excretion, and in matters concerning sex, nudity or excretion which is either shameful, morbid, unhealthy or unwholesome. A book, magazine, film or similar matter which appeals or panders to an interest in sex, nudity or excretion, that can be described by any of those adjectives, appeals to prurient interest.

This does not mean that material can be said to appeal to prurient interest merely because it describes an activity of which you disapprove or which you believe to be sinful, such as adultery. It is not the activity that the material describes or depicts, but the manner in which it describes or depicts it that determines whether the material is prurient. If the material is calculated by the physical actions that it describes and the detail and character of the depictions that it contains to appeal and excite in the reader shameful, morbid, unhealthy or unwholesome interests, thoughts or desires concerning sex, nudity or excretion, you can find that it appeals to prurient interest.

"Morbid" as used in these instructions, means sick, unhealthy or unwholesome.

"Substantially" means in a way having substance, that is, in a significant or material or essential respect rather than in a merely formal or minimal imaginary way.

The definition of "utterly" is as follows: To an absolute [882] or extreme degree; to the full extent; absolutely, altogether, entirely, fully, thoroughly, totally.

The word "redeeming" refers not to a balancing of the pruriency against the social importance of the material, but rather to the presence of matters of social importance in the content which will recover for the material its position as Constitutionally protected utterance.

In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled in a matter for you, the Jury, to determine.

The United States Supreme Court has ruled that obscenity is not protected by the first amendment to the United States Constitution and may be prosecuted.

Sex is not synonymous with obscenity. However, you may consider the circumstances and the manner in which they are or may be portrayed as you weigh the matter under the definition of obscenity which I have given to you.

Evidence that matter allegedly similar and comparable to that presently in question is openly exhibited in the community may [883] be considered by the Jury for such bearing, if any, as it may have on the questions of customary limits of candor and contemporary community standards. The weight of such evidence is entitled is a matter for the Jury to determine in light of all the circumstances, including, but not limited to, whether the alledgedly similar and comparable matter is in fact similar and comparable to the matter which is the subject of the present charge and whether such allegedly similar and comparable matter enjoys substantial community acceptance. Availability and accessibility may or may not, depending on all the circumstances, indicate acceptibility to contemporary community standards.

The fact, if it be a fact, that the films in question were not distributed to minors or to unwilling adults, shall not be considered by you in arriving at the guilt or innocence of the defendants.

Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance.

If the object of work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, this may be considered as evidence that the work is obscene.

The Court has charged you that one ingredient of [884] "obscenity" is the appeal of the material to prurient interest. "Prurient" is a word that may mean different things to different persons.

Under the law herein, a prurient interest is a shameful or morbid interest in sex or nudity as distinguished from a candid and normal interest in sex or nudity. Material does not appeal to a prurient interest if the average person can view the material candidly, openly and with the normal interest in sex which all persons presumably have in greater or lesser degree.

Contemporary community standards are set by what is in fact generally available and accepted in the community as a whole and not by what some persons or groups of persons may believe the community as a whole ought to accept or reject, because the determination of contemporary community standards must be objective rather than subjective.

In determining whether the matter goes substantially beyond customary limits of candor, measured contemporary community standards, you may consider what is going on in the community, not necessarily what ought to be going on. In this regard you may consider what is generally available in book stores, motion picture theaters, bars, archives, night clubs,

and all other forms of communication in the community. You are to consider not only what kinds of books, magazines, films and live entertainment exist in the community, but also the circumstances of dissemination.

"Sex" and "obscenity" are not synonymous. The portrayal of sex is not in itself a violation of the statute. Sex is one of [885] the vital problems of human interest and public concern.

The freedom of speech and the press guaranteed by the Constitution embraces the liberty to discuss publicly and candidly all matters of public concern, including sex.

The question of whether the matter is utterly without redeeming social importance is not to be judged with reference to the average person. The matter may have redeeming social importance even though it is beyond the understanding of the average man and embraced by the morals of the day. This is because all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees of the first amendment.

A film has social importance if it has the capacity to broaden man's range of sympathies or consciousness, or to enable him to see, hear or appreciate what he might have otherwise missed, or deepens his emotions, or makes life seem richer, more interesting or more comprehensible, or offers entertainment or provides information or insights into man's relationship

to the society in which he lives. A film may have social importance if it appears worthless to the average person or to most people.

The statute herein requires proof, in addition to knowledge of obscenity, of a specific intent to appeal to the prurient interest of the average person who may view the films involved herein. Unless such specific intent is established beyond a reasonable doubt as to the defendants, the defendants must be found not guilty.

[886] The mere fact that a film depicts sexual activity, masturbation, male or female genitalia, bare buttocks or pubic hair is insufficient in and of itself to condemn such film as obscene in law and to deny such film the Constitutional protection of freedom of speech and press.

Knowledge of the alleged obscenity of the films here cannot be inferred merely from the fact, if you find it to be a fact, that any defendant sold the films.

A film may not be deemed obscene unless it is utterly without redeeming social importance. Under the law, the word "utterly" has been defined as follows: To an absolute or extreme degree; to the full extent; absolutely; altogether; entirely; fully; thoroughly; totally. In other words, the Constitution protects all material relating to sex except that which is totally devoid of any social importance.

The word "redeeming" refers not to a balancing of the alleged pruriency against the social importance, but rather to the presence of matters of social importance in the content of the material taken as a

whole which gains for the material a position of Consitutionally protected speech. The Jury will, therefore, keep in mind that in addition to the standards for judging obscenity heretofore defined no film can be found to be obscene unless the film is utterly without redeeming social importance as the Court has defined.

Your own personal and social views of material such as that charged in the information may not be considered. Thus, **[887]** whether you believe that the material is good or bad is of no concern; so too you may not consider whether in your opinion the material is moral or immoral; whether it is likely to be helpful to or injurious to the public morals. Similarly, whether you like or dislike the material, whether it offends or shocks you, may not be considered by you. You may think the material is immoral, shocking or offensive, and yet you must acquit the defendant if the material is not obscene as the Court has defined that term for you.

The mere private possession of obscene material is not a criminal offense.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

EVELLE J. YOUNGER,
Attorney General of the State of California.
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division.
DORIS H. MAIER,
Assistant Attorney General.
ROBERT R. GRANUCCI,
Deputy Attorney General.
WILLIAM D. STEIN,
Deputy Attorney General.
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

Table of Authorities Cited

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN,
Petitioner,

VS.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner seeks review of a judgment entered by the California Court of Appeal, First Appellate District, Division Three on March 29, 1976. Pursuant to California Rules of Court, Rule 976, it has neither been officially reported, nor published, but is set forth in full as Appendix A of this opposition. That opinion was entered following this Court's vacation of an earlier judgment of the California Court of Appeal rendered on January 11, 1973. See *Splawn* v. *California*, 414 U.S. 1120 (1974). Pursuant to California Rules of

Court, Rule 976, this earlier opinion was neither officially reported, nor published, but is set forth in full as Appendix B of this opposition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code section 1257(3).

STATEMENT OF THE CASE

Proceedings in the State Courts

Mr. Drivon, a part-time employee of the Redwood City police department, had known petitioner since 1966, when he first offered Mr. Drivon "hardcore" pornography. In late 1969 Mr. Drivon began negotiating with petitioner's brother Don for the purchase of some "hardcore" films. Don informed Drivon that such films were available at approximately $50 a reel but stated they were not carried in stock at petitioner's bookstore. He thereafter arranged several unsuccessful appointments for Drivon to pick up the films which Don mentioned were being furnished by petitioner.

On November 5, 1969, Drivon met with petitioner at his bookstore to further discuss the purchase of these films. Petitioner made a phone call and stated that he could obtain the films in two days; however, if Drivon were in a hurry, petitioner would drive to San Francisco and pick them up. They settled on the price of

the films, which petitioner stated were normally selling for much more in San Francisco. He also explained to Drivon that he had to be very careful in handing these films since they were "hardcore" material over which he had previously been in trouble with the police. Petitioner assured Drivon that he would be getting strictly "hardcore" material.

When Drivon returned to petitioner's bookstore on November 7 the clerk gave him a package containing two reels of film in exchange for $70. Drivon thereafter contacted petitioner on the phone and from their conversation it was apparent that petitioner had previously viewed these films. Indeed, petitioner admitted at trial that he had viewed the films prior to selling them.

The films themselves were admitted into evidence at petitioner's trial for violating California Penal Code sections 182.1 (conspiracy to distribute obscene material) and 311.2 (distribution of obscene material). He was convicted by a jury on June 22, 1971 of distributing obscene material. Probation was denied, and petitioner was sentenced to county jail for a period of 91 days. One day was suspended and a fine was imposed in the amount of $4,000. Timely notice of appeal to the California Court of Appeal was filed and petitioner was admitted to bail pending that appeal.

On his direct appeal petitioner raised nine issues including an attack on the trial court's instructions concerning "pandering." That issue was resolved adversely to appellant by the California Court of Appeal. See Appendix B, pp. xviii-xx. Thereafter, peti-

tioner sought a hearing before the California Supreme Court which was denied, without opinion, on March 8, 1973.

Proceedings in Splawn v. California, No. 73-200

Petitioner's 1973 application to this court for a writ of certiorari raised only three of the nine arguments he had presented to the California Court of Appeal. They were: constitutionality of the jury selection system; constitutionality of the definition of obscenity in the California statute; and, whether excluding from criminal liability film projectionists was an invidious discrimination against book sellers. Significantly, petitioner did not attack the California Court of Appeal's judgment that the jury was properly instructed on "pandering."

This Court granted certiorari on January 7, 1974, vacated the judgment of the California Court of Appeal and remanded the case "for further consideration in light of *Miller* v. *California,* 413 U.S. 15 (1973); *Paris Adult Theater I* v. *Slaton,* 413 U.S. 49 (1973); *Kaplan* v. *California,* 413 U.S. 115 (1973); *United States* v. *12 200-ft. Reels of Film,* 413 U.S. 123 (1973); *Roaden* v. *Kentucky,* 413 U.S. 496 (1973); and *Alexander* v. *Virginia,* 413 U.S. 830 (1973)."

Proceedings in the State Courts on Remand

Upon receipt of this Court's order vacating its earlier judgment, the California Court of Appeal requested additional briefing on the constitutionality of the definition of "obscenity" as contained in California Penal Code section 311(a). The California Court of Appeal reaffirmed petitioner's conviction on March 29, 1976 in an opinion which substantially republished, without material difference, those portions of its earlier opinion concerning petitioner's claim that the "pandering" instructions were improper. Petitioner's application to the California Supreme Court for a hearing was denied on May 26, 1976 and, the instant petition for a writ of certiorari to review the latest judgment of the California Court of Appeal was filed on July 31, 1976.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I, provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the People peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment XIV, provides, in material part that:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

3. Title 28, USC Section 2101:

The time for appeal or application for a writ of certiorari to review the judgment of the state court in a criminal case shall be as proscribed by Rules of the Supreme Court.

4. Rules of the Supreme Court, Rule 22(1):

A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the Clerk within 90 days after the entry of such judgment. A justice of this Court, for good cause shown, may extend the time for applying for writ of certiorari in such cases for a period not exceeding 60 days.

5. California Penal Code section 311(a) provided, at the time of petitioner's trial, that:

(a) "Obsence matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual

groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

* * *

6. California Penal Code section 311.2 provides that:

(a) Every person, who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place where he is so employed.

(c) Except as otherwise provided in subdivision (b), the provisions of subdivision (a) with

respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no financial interest in the place wherein he is so employed and has no control, directly or indirectly, over the exhibition of the obscene matter.

QUESTIONS PRESENTED

1. Was the instant petition for a writ of certiorari seeking review of the jury instructions on "pandering" timely filed?

2. Does a California rule of evidence allowing the jury to consider, as probative on the issue of obscenity, petitioner's pandering of obscene material violative of the federal constitution?

3. Does the exemption from the operation of the California Obscenity Statute provided film projectionists who have no financial interest in their places of employment deny equal protection of the law to persons working in book stores?

4. Does petitioner, the owner of a book store with a substantial financial interest in it, have standing to raise an equal protection argument with respect to the exemption for film projectionists?

ARGUMENT

I

INSOFAR AS THE INSTANT PETITION SEEKS TO REVIEW THE CONSTITUTIONALITY OF CALIFORNIA'S RULE OF EVIDENCE CONCERNING "PANDERING", IT IS NOT TIMELY.

Although petitioner challenged the validity of the "pandering" instruction in the California Court of Appeal, he did not present that issue to this Court in his petition for writ of certiorari filed on July 30, 1973 in No. 73-200. In that case, this court vacated the judgment of the California Court of Appeal and remanded for further consideration of the validity of the California Penal Code definition of obscenity. The California Court of Appeal disposed of that issue in an opinion filed on March 29, 1976, and, since this Court had vacated its previous opinion, republished, *in haec verba,* its earlier opinion that the "pandering" instruction was proper. Compare Appendix A, pp. viii-ix with Appendix B, pp. xviii-xx. This Court's opinion in *Splawn* v. *California,* 414 U.S. 1120 (1974), vacating the judgment of the California Court of Appeal did not go to the issue of the validity of the "pandering" instruction, since that issue was not presented by the petition for certiorari. Hence, with respect to this issue, it is respondent's position that the first petition for certiorari was similar to a petition for rehearing which does not challenge the adjudication of an issue and did not therefore extend the time within which to petition for certiorari. *Department of Banking* v. *Pink,* 317 U.S. 264, 266 (1942).

The test of finality, which is a prerequisite to this Court's review of state court judgments, is whether the record shows that the judgment of the highest state court has in fact finally adjudicated the rights of the parties and, that adjudication is not subject to further review in the state courts. *Compare, Department of Banking* v. *Pink, supra, at* 268. With respect to the "pandering" issue, that was the state of the record in this case in 1973. Since the Court of Appeal's 1976 opinion did not disturb or revise the legal rights and obligations of the parties on the "pandering" issue which were settled in its 1973 judgment, and that issue was not presented in the 1973 original petition for certiorari, the rule of *Department of Banking* v. *Pink, supra,* should be applied to deny petitioner a new 90 day period within which to seek review by certiorari of the "pandering" issue. *Compare F.T.C.* v. *Minneapolis-Honeywell Company,* 344 U.S. 206, 212 (1952); *F.T.C. v. Idaho Power Company,* 344 U.S. 17, 20 (1952).

Petitioner is attempting to review, in a piecemeal fashion, the California Court of Appeal's decision affirming his conviction. This is contrary to the principle that litigation must at some definite point be brought to an end. Although none of the authorities relied upon in his argument were decided after the filing of the 1973 petition for certiorari, petitioner does not favor us with any explanation of his failure to raise this issue then. Respondents respectfully urge therefore, that as to the "pandering" issue, the petition for a writ of certiorari is untimely.

II

THE CALIFORNIA COURT OF APPEAL CORRECTLY CONCLUDED THAT THE JURY WHICH CONVICTED PETITIONER WAS PROPERLY INSTRUCTED ON THE DOCTRINE OF "PANDERING".

Initially, respondent notes that since the constitutional tests of obscenity is now less stringent than that found in the California law — "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" [*Miller* v. *California,* 413 U.S. 15, 24 (1973)], rather than "utterly without redeeming social importance" [See *Bloom* v. *Municipal Court,* 16 Cal.3d 71, 76-77, 127 Cal.Rptr. 317, 320-321 (1976); and *People* v. *Enskat,* 33 Cal.App.3d 900, 910-911, 109 Cal.Rptr. 433, 439-441 (1973), *cert. den.* 418 U.S. 937 (1974)] — petitioner's argument no longer rises to the level of constitutional dignity because the statute he challenges is merely a California rule of evidence and, review by certiorari would be inappropriate. Rules of the Supreme Court, Rule 19.

Petitioner argues that the "pandering" doctrine emanating from *Ginsberg* v. *United States,* 383 U.S. 463 (1966), must be restrained to a narrow field and he contends the trial court exceeded the appropriate limits of this doctrine when it gave the complained of instruction. Relying on a single quotation from *Ginsberg, supra,* at 474, petitioner seeks to restrain the "pandering" doctrine to close cases. But the fact that *Ginsberg* may have been a close case, and the evidence of pandering served to resolve "all ambiguity and doubt" (*Ginsberg, supra,* at 470), does not indicate that the relevancy, as distinguished from the probative

force, of such evidence is any less in other cases. Petitioner also asserts that the "pandering" doctrine is limited to commercial exploitation of the material as distinguished from a mere retail sale. The complained of instruction distinguished between mere commercialism, in the sense of selling the material at a profit, and the promotion of such sales by reference to the prurient appeal of the material. Petitioner's argument that the use of the words "commercial exploitation" are too vague to give adequate notice to retail sellers of what conduct is p oscribed, are similar to argument made against obscenity statutes themselves and have continually been rejected. See *Hamling* v. *United States,* 418 U.S. 87, 117-119 (1974); *Bloom* v. *Municipal Court,* 16 Cal.3d 71, 77-81, 127 Cal.Rptr. 317, 320-324 (1976); and *People* v. *Enskat,* 33 Cal. App.3d 900, 908-910, 109 Cal.Rptr. 433, 438-440 (1973). Moreover, throughout the negotiations for the sale of this material, petitioner assured the buyer that the matter was "hardcore" (RT 44-47).

Petitioner next complains that the instruction improperly referred to the motivation of the creator of the work, a person not on trial or before the court. Although the California Courts have subsequently held this portion of the instruction erroneous, in the absence of evidence the creator was connected with the defendants who are charged with distributing a d exhibiting obscene matter, the error is not necessarily prejudicial. *People* v. *Kuhns,* 61 Cal.App.3d 735, 755, 132 Cal. Rptr. 725, 736 (1976). Petitioner testified that he had viewed the films prior to their sale (RT

633) and conceded to the California Court of Appeal that the jury was properly instructed on the elements of obscenity. Thus, he would bear a heavy burden to establish that any other error in the instructions reached proportions requiring reversal. See *People* v. *Williamson,* 207 Cal.App.2d 839, 842, 24 Cal.Rptr. 734, 736 (1962). Since the jury was properly instructed on the elements of the offense, they could not have been misled that evidence offered on pandering would satisfy all elements of the offense, or that the creators rather than the defendants' acts were under scrutiny. Indeed, there was no evidence before the jury as to the manner in which these films were produced. Hence, they could not have been misled by the fact that the instructions contained a complete reading of California Penal Code section 311(a). *Compare People* v. *Kuhns, supra.* Moreover, the Court of Appeal viewed the films and concluded that the jury did not err in finding them obscene. See Appendix A, p. xii, Appendix B, p. xxii.

Finally, petitioner characterizes the trial court's instructions on the probative value of "pandering" evidence as a retroactive application of a new penal statute. California Penal Code section 311(a)(2) was amended effective November 10, 1969, three days after appellant sold the films which form the basis for his conviction. That amendment provided that evidence matter was commercially exploited by the defendant for the sake of its prurient appeal is probative with respect to the nature of that matter and can justify the conclusion that the matter is utterly without re-

deeming social importance. The amendment did not aggravate the punishment for the offense, create a crime which did not previously exist, or lower the standard of proof required for conviction. Thus, it is similar to an amendment allowing a wife to waive the marital privilege, or the admission of handwriting exemplars. As such, the controlling date under California law for its application, is the trial date rather than the date of the criminal offense. *Compare People* v. *Bradford,* 70 Cal.2d 333, 343-344, ftn. 5, 74 Cal. Rptr. 726, 731 (1969); *People* v. *Snipe,* 25 Cal.App.3d 742, 747-748, 102 Cal.Rptr. 6, 9 (1972). Three years before petitioner sold these films this court recognized the probative value of evidence that a defendant was exploiting, for commercial purposes, material openly advertised to appeal to the erotic interest in his customers. *Ginsberg* v. *United States,* 383 U.S. 463 (1966). Thereafter the California courts held that evidence of commercial exploitation to prurient interest would justify a conclusion that the material offered was utterly without redeeming social value. *Landau* v. *Fording,* 245 Cal.App.2d 820, 824, 54 Cal.Rptr. 177, 179-180 (1966), affirmed per curiam 387 U.S. 456 (1967).[1] Thus, the probative value of the manner in

[1]In *Ginsberg v. United States, supra,* the defendant's conviction was affirmed solely on the grounds of pandering since the material offered was found not to be obscene. There was a suggestion in *Landau v. Fording, supra,* 245 Cal.App.2d at 830, 54 Cal.Rptr. at 183, that a like result was possible under California law. But that finding was dicta since the material at issue there was found to be obscene. Subsequently, in *People v. Noroff,* 67 Cal.2d 791, 793, 63 Cal.Rptr. 575, 576 (1967) the California Supreme Court specifically disapproved *Landau v. Fording, supra,* insofar as it suggested that California recognized as a crime the "pandering" of non-obscene material.

which obscene material is purveyed was recognized in California long before petitioner's sale of these films and he has not therefore been subjected to any ex post facto or retroactive application of the criminal laws of the State of California.

III

THE CALIFORNIA OBSCENITY STATUTE WHICH EXEMPTS FILM PROJECTIONISTS WHO HAVE NO FINANCIAL INTEREST IN THEIR PLACE OF EMPLOYMENT FROM CRIMINAL LIABILITY, DOES NOT DENY PETITIONER EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Petitioner contends that California Penal Code section 311.2 is unconstitutional in that it violates the equal protection clause of the Fourteenth Amendment by providing an exemption for projectionists while leaving clerks in bookstores subject to prosecution. California Penal Code section 311.2(b) provides in pertinent part that the criminal sanctions on the exhibition of obscene matter do not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment. It is provided, however, that such operator or projectionist must have no financial interest in the place wherein he is employed.

Petitioner argues he has been denied the equal protection of the law since a similar exemption is not pro-

vided for persons working in bookstores.[2] Contrary to petitioner's assertion [See Petition, p. 20, lines 3-5], a person who operates a motion picture projector is not entitled to the benefits of this exemption if he is the only person on the premises, supervises the operation, collects or takes responsibility for the receipts, or in effect is in charge of the operation. *People* v. *Stout,* 18 Cal.App.3d 172, 176, 95 Cal.Rptr. 593, 595-596 (1971).

There is a valid distinction upon which the California Legislature acted between the classes of "motion picture operator or projectionist" and "bookstore clerk." The licensing requirements for a motion picture theater in many cities and counties restrict the class of persons authorized to operate the projection equipment in order to insure the safety of the audience. Moreover, many theater owners have contracts with labor unions limiting those who can operate the projection equipment in their theaters to members of a particular union. If these groups were to fear prosecution simply for running a projector, without any control over the film's content or the audience make-up, a chilling effect on protected speech might

[2]The evidence in this case is quite clear that petitioner was not a mere employee of a bookstore but rather its owner, i.e., "One who had a substantial financial interest in the place wherein he is employed." As such, respondent submits petitioner does not have standing to raise an equal protection argument.

> "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines,* 362 U.S. 17, 21 (1960), and the cases cited therein.

result from the precautions this group would be forced to take for their own protection.[3] Petitioner has failed to show this classification is palpably arbitrary and without a sound basis in reason. Absent such showing a classification based on legislative experience is presumed valid and will not be rejected. *Compare Fleming* v. *Nestor,* 363 U.S. 603, 612 (1960).

This exemption granted projectionists does not have a potentially inhibiting effect on protected speech. Nor, does it require petitioner to act at his peril at the expense of the free dissemination of ideas. *Compare Winters* v. *New York,* 333 U.S. 507, 510, 517-518 (1948). Rather, it is an attempt to narrowly tailor California Penal Code section 311.2(a) to the objective sought by the Legislature and the requirements of the equal protection clause as applied in the area of First Amendment rights. *Compare Chicago Police Department* v. *Mosley,* 408 U.S. 92, 101 (1972). Indeed, the California Legislature recently amended Penal Code section 311.2 by adding subsection (c) which exempts employees of licensed premises who in the course of their employment have no control, direct or indirect, over the exhibition of obscene matter on these premises.

[3]It is because this exemption avoids an invidious prior restraint on the exercise of the right to free expression that under the requirements of *United States v. Raines, supra,* petitioner has no standing to challenge this statute on equal protection grounds. Since this statute does not restrict anyone's right to free expression the exemption to the standing requirements recognized in *Smith v. California,* 361 U.S. 147, 151 (1959) does not apply.

CONCLUSION

For the reasons set forth above, the People of the State of California respectfully request that the petition for writ of certiorari be denied.

Dated, November 5, 1976.

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(Appendices Follow)

APPENDICES

Appendix A

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

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1 CRIMINAL No. 10,255
(SUP. CT. No. C 123)

People of the State of California,
Plaintiff and Respondent,
vs.
Roy Splawn,
Defendant and Appellant.

[Filed Mar. 29, 1976]

OPINION

This is a pornography case here on remand from the United States Supreme Court. Judgment of this court was entered on January 11, 1973, affirming appellant's conviction of violation of Penal Code section 311.2 (distribution of obscene material). Appellant's petition for writ of certiorari was granted. On January 7, 1974, judgment of this court was vacated and the cause remanded for consideration of this court in light of *Miller* v. *California,* 413 U.S. 15; *Paris Adult*

Theatre I v. *Slaton,* 413 U.S. 49; *Kaplan* v. *California,* 413 U.S. 115; *United States* v. *12 200-ft. Reels of Super 8mm. Film,* 413 U.S. 123; *United States* v. *Orito,* 413 U.S. 139; *Heller* v. *New York,* 413 U.S. 483; *Roaden* v. *Kentucky,* 413 U.S. 496; and *Alexander* v. *Virginia,* 413 U.S. 836.

In *Miller,* the court arrived at standards for testing the constitutionality of state legislation regulating obscenity and it is against these standards that we are directed to consider the conviction of appellant. Although *Miller* involved the same statute of which appellant stands convicted (Pen. Code, § 311.2), the court remanded Miller's case considering that an existing state statute, while not couched in terms of the new requirements, might have been previously construed in such a way as to meet new specificity requirements.

This court ordered the recall of its remittitur on February 14, 1974, and on August 1, 1974, the parties having so stipulated, the submission of the cause was vacated to await the resolution of the constitutionality of the California statute, a question then again pending in the federal courts. The question has now been decided by the California Court in *Bloom* v. *Municipal Court* (1976) 16 Cal.3d 71, in which it was held that Penal Code section 311 satisfied the requirement of specificity articulated in *Miller.* The Supreme Court ruled that section 311 "has been and is to be limited to patently offensive representations or descriptions of the specific 'hard core' sexual conduct given as examples in *Miller I,* i.e., 'ultimate sexual acts, normal or

perverted, actual or simulated,' and 'masturbation, excretory functions, and lewd exhibitions of the genitals.' (413 U.S. at p. 25.) As so construed, the statute is not unconstitutionally vague." (16 Cal.3d at p. 81.)

We turn now to other issues raised by appellant Splawn in the appeal from the judgment convicting him of violation of section 311.2 of the Penal Code and since our previous opinion has been vacated, now affirm the judgment of the lower court for the reasons explained below:

Appellant was charged with selling to one Drivon two reels of movie film depicting sexual activity between two persons and three persons, including sexual intercourse, oral copulation and sodomy. Appellant at that time claimed that Penal Code section 311.2 is unconstitutional in that it violates the equal protection clause by exempting projectionists from its provisions while leaving clerks of bookstores subject to prosecution. Appellant, however, was not a clerk in a bookstore but rather its owner. The rule permitting a person to attack a statute only on constitutional grounds applicable to himself precludes appellant from raising this point. "The rule is well established . . . that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations. (Citations.) Petitioner has not shown that the statute is being invoked against him in the aspects or under the circum-

stances which he suggests, and hence may not be heard to complain." (*In re Cregler,* 56 Cal.2d 308, 313; *People* v. *Maugh,* 1 Cal.App.3d 856, 862; compare *In re Davis,* 242 Cal.App.2d 645, 666.)

Appellant also attacks the constitutionality of this section on the additional ground that it goes beyond the area of legitimate state control. His position is that a state can only make criminal the dissemination of obscene material to juveniles, unwilling adults, or the "pandering" of such materials to prurient interest. This position was rejected by the California Supreme Court in *People* v. *Luros,* 4 Cal.3d 84. Here, as in *Luros,* evidence discloses commercial distribution of obscene material. The films in the present case were sold for $70.00.

In addition to his attack on the constitutionality of section 311.2, appellant contends that the jury was improperly selected, that the jury was improperly instructed, and that the evidence is insufficient to support the conviction. None of these contentions may be sustained.

Appellant contends that the jury was improperly selected in that prospective jurors were excluded from the venire because they had not been residents of the county for one year. Appellant argues that the residency requirement incorporated in Code of Civil Procedure section 198 deprives him of his constitutional right to trial by a jury selected from a cross-section of the entire comunity.

It is clear that certain groups united by common interests or characteristics may not be excluded from

jury service. The United States Supreme Court has listed six bases on which groups may not be excluded—economic, social, religious, racial, political, and geographical. (*Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 220.) It has recently been argued that exclusion in Code of Civil Procedure section 198 of persons under 21 was impermissible but this argument was rejected in *People* v. *Hoiland,* 22 Cal.App.3d 530, wherein the court pointed out that it was "'highly speculative whether the decisional outlook of such excluded persons would be different than that of persons a mere few years older.'" (*People* v. *Hoiland, supra,* at 536, quoting *King* v. *United States,* 346 F.2d 123, 124.) Such an observation is clearly pertinent with regard to the residence requirement. Persons residing in a county under one year come from either sex and from all racial, religious, political and economic groups. They comprise no cohesive group and their exclusion does not deprive a defendant of his right to be tried by a cross-section of the community.

Appellant also argues that the residence requirement arbitrarily deprives a section of the community of their right to be considered for public service. He relies on recent cases wherein certain residency requirements for voting and pursuing elective office have been held to serve no legitimate state interest. (See *Keane* v. *Mihaly,* 11 Cal.App.3d 1037, one-year requirement for voting; *Camara* v. *Mellon,* 4 Cal.3d 714, three-year requirement to run for city council; *Zeilenga* v. *Nelson,* 4 Cal.3d 716, five-year requirement to run for board of supervisors.) These cases have

reached the courts by way of petitions brought by persons denied the right to vote or run for office. Assuming *arguendo* that the residency requirement for service on a petit jury is subject to the same principles, the requirement should be challenged by those denied the right to serve. The defendant in a criminal case is not prejudiced by the denial of the right to serve on a jury by virtue of the residency requirement. His right is to be judged by a cross-section of the community and this right is not prejudiced by the residency requirement. Any error in this regard would not require reversal of this case.

Appellant argues that the jury was misinstructed as to the definition of the word "knowingly" as used in Penal Code section 311(e) and Penal Code section 311.2. The sale of the films occurred on November 7, 1969, and it is the law on that date which applies here.

Between 1961 and 1969, Penal Code section 311(e) provided that "knowingly" meant having knowledge that the matter was obscene. Prior to 1961, the prosecution had to establish that the defendant knew the content of the material but it was not necessary to show that he also knew it was obscene. (*People* v. *Harris,* 192 Cal.App.2d Supp. 887, 892, reversed on other grounds; *In re Harris,* 56 Cal.2d 879; *People* v. *Williamson,* 207 Cal.App.2d 839, 846, disapproved on other grounds, *In re Giannini,* 69 Cal.2d 563, 577.) In 1961 this section was amended to provide that the defendant had to have knowledge that the matter was obscene. This was not interpreted to mean knowledge

that a court would decide the matter was obscene. A reasonable construction was held to be that "[t]he defendant must have known the contents of the material, and must have been in some manner aware of its obscene character." (People v. Campise, 242 Cal. App.2d Supp. 905, 915.) Penal Code section 311(e) was amended, effective November 10, 1969, to provide that "'[k]nowingly' means being aware of the character of the matter . . . ."

The instructions as to knowledge given in the case at hand are as follows: "The word 'knowingly' as used in the context of Penal Code Section 311.2, means that each of the defendants must have known the contents of the material, and must have been in some manner aware of its obscene character. It is not necessary to construe 'knowledge that the matter is obscene' as meaning that each of the defendants knew that a Court would decide the matter to be legally obscene, . . .

"Nor is direct evidence that each of the defendants has personally viewed the films in question necessary, for knowledge may be established by circumstantial evidence."

The jury was instructed properly either under the statute as it stood prior to 1969 (*People* v. *Campise, supra; People* v. *Pinkus,* 256 Cal.App.2d Supp. 941, 949-950) or under its later amendment. There was no necessity, as appellant contends, to repeat the definition of obscenity and require the jury to find appellant had knowledge of the presence of all elements of such a definition.

Appellant also complains of the following instructions: "In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled in [sic] a matter for you, the Jury, to determine.

* * *

"Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter [is] utterly without redeeming social importance."

These instructions conform to the language of Penal Code section 311(a)(2) which was added to the statute in the 1969 amendment. In 1966 the Supreme Court in *Ginzburg v. United States,* 383 U.S. 463 recognized the probative value of evidence a defendant was exploiting, for commercial purposes, material openly advertised to appeal to the erotic interest of his customers, an activity referred to as "pandering." In 1967 the California Supreme Court in *People v.*

Noroff, 67 Cal.2d 791, 793, pointed out that the Legislature had not created the crime of pandering. The court did not, however, disapprove of any use of evidence of pandering for its probative value on the issue of whether the material was obscene. It merely rejected the concept of pandering of nonobscene material as a separate crime under the existing laws of California.

The 1969 amendment did not make pandering of nonobscene material a separate crime. Rather it clarified the use to which evidence of pandering might be made in the determination of whether one of the requirements of obscenity existed, *i.e.,* lack of any redeeming social value. It did not aggravate the punishment for the offense, create a crime which did not previously exist, or deny the accused a vested defense. The application of the amendment to the appellant's trial does not contravene the constitutional doctrine prohibiting ex post facto laws. (See *People v. Bradford,* 70 Cal.2d 333, 343-344, fn. 5; *People v. Snipe,* 25 Cal.App.3d 742, 747-748.)

Appellant also contends that there is no substantial evidence to support a finding that the films in question went beyond the "customary limits of candor" or that the predominant appeal of the films was to the "prurient interest" of the average person, as required by section 311 et seq. of the Penal Code.

" 'Obscene matter' means matter, taken as whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity,

sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." (Pen. Code, § 311(a); see *Roth v. United States,* 354 U.S. 476, 488-489.)

The test of community standards applies to the questions of whether the predominant appeal of the material is to "prurient interest" and also to the question of whether the material exceeds the "customary limits of candor." (*In re Giannini, supra,* 69 Cal.2d 563, 572-574.) A statewide rather than a national standard is applicable to judge community standards where the subject matter is "obviously not intended for nationwide dissemination." (*In re Giannini, supra,* at 579.) The prosecution, in order to bear its burden of proof, must introduce evidence of community standards through expert testimony, since the judge or jury, which makes the initial factual determination, and later the appellate court, which must reach an independent decision as to the obscenity of the material (*Zeitlin v. Arnebergh,* 59 Cal.2d 901, 908-909), do not compose a cross-section of the community. (*In re Giannini, supra,* at 574-576.)

To establish that these films exceeded the contemporary community standards of candor in California, the People presented Officer Barber of the Los Angeles Police Department. The trial court ruled that he was "qualified to give his opinion in the area of

obscenity, the general area of obscenity." He had viewed the films in question as well as other films brought to the attention of his department during the period in question. He testified that the depiction on film of close-ups of sexual intercourse, oral copulation, sodomy and masturbation were beyond the customary limits of candor in the State of California. There was no evidence to the contrary. A viewing of the films indicates they do depict these activities.

Appellant objects to the testimony of Officer Barber as an expert witness but it is clear that this officer's interviews and studies of interviews for a state survey, the questioning of laymen, and participation in civic panels were directed toward ascertaining the standards of the community in the area of obscenity. We have concluded that the court did not err in admitting this testimony and in instructing the jury regarding the weight to be given it.

The other expert witness for the prosecution was Dr. Peschau who testified that he had experience in evaluating the psychologically healthy, as well as the mentally ill and sexually disturbed. He testified that, in his opinion, the predominant appeal of the films was to a prurient interest. Appellant's objections to his qualifications and opinion go to the weight of his testimony.

The fact that Dr. Peschau and Officer Barber expressed their opinions in terms of ultimate facts does not render their testimony inadmissible. (Evid. Code, § 805; *People v. Cole,* 47 Cal.2d 99, 105.) The jurors were instructed that they were not bound by the tes-

timony of the experts but should give it the weight to which they found it to be entitled and disregard it if they found it to be unreasonable.

We have viewed the movie films and have concluded that the jury did not err in its findings of obscenity.

The judgment is affirmed.

Brown (H. C.), J.

We concur:

Draper, P.J.

Caldecott, J.*

1 Crim. 10255

*Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

Appendix B

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 CRIMINAL NO. 10,255
(SUP. CT. NO. C 123)

People of the State of California,
Plaintiff and Respondent,
vs.
Roy Splawn,
Defendant and Appellant.

[Filed Jan. 11, 1973]

OPINION

This is an appeal from a judgment following a jury verdict of guilty of violation of section 311.2 of the Penal Code (distribution of obscene material). Appellant was charged with selling to one Drivon two reels of movie film depicting sexual activity between two persons and three persons, including sexual intercourse, oral copulation and sodomy.

Appellant contends the jury was improperly selected; that Penal Code section 311.2 is unconstitutional; that the jury was improperly instructed, and that the evidence is insufficient to support the conviction. We have concluded that appellant's contentions are without merit for the reasons set forth below:

Appellant contends that the jury was improperly selected in that prospective jurors were excluded from the venire because they had not been residents of the county for one year. Appellant argues that the residency requirement incorporated in Code of Civil Procedure section 198 deprives him of his constitutional right to trial by a jury selected from a cross-section of the entire community.

It is clear that certain groups united by common interests or characteristics may not be excluded from jury service. The United States Supreme Court has listed six bases on which groups may not be excluded—economic, social, religious, racial, political, and geographical. (Thiel v. Southern Pacific Co., 328 U.S. 217, 220.) It has recently been argued that exclusion in Code of Civil Procedure section 198 of persons under 21 was impermissible but this argument was rejected in *People v. Hoiland,* 22 Cal.App.3d 530, wherein the court pointed out that it was " 'highly speculative whether the decisional outlook of such excluded persons would be different than that of persons a mere few years older.' " (People v. Hoiland, supra, at 536, quoting King v. United States, 346 F.2d 123, 124.) Such an observation is clearly pertinent with regard to the residence requirement. Persons residing in a county under one year come from either sex and from all racial, religious, political and economic groups. They comprise no cohesive group and their exclusion does not deprive a defendant of his right to be tried by a cross-section of the community.

Appellant also argues that the residence requirement arbitrarily deprives a section of the community of their right to be considered for public service. He relies on recent cases wherein certain residency requirements for voting and pursuing elective office have been held to serve no legitimate state interest. (See Keane v. Mihaly, 11 Cal.App.3d 1037, one-year requirement for voting; Camara v. Mellon, 4 Cal.3d 714, three-year requirement to run for city council; Zeilenga v. Nelson, 4 Cal.3d 716, five-year requirement to run for board of supervisors.) These cases have reached the courts by way of petitions brought by persons denied the right to vote or run for office. Assuming *arguendo* that the residency requirement for service on a petit jury is subject to the same principles, the requirement should be challenged by those denied the right to serve. The defendant in a criminal case is not prejudiced by the denial of the right to serve on a jury by virtue of the residency requirement. His right is to be judged by a cross-section of the community and this right is not prejudiced by the residency requirement. Any error in this regard would not require reversal of this case. (Compare People v. White, 43 Cal.2d 740.)

Appellant next contends section 311.2 is unconstitutional in that it violates the equal protection clause by exempting projectionists from its provisions while leaving clerks of bookstores subject to prosecution. Appellant, however, was not a clerk in a bookstore but rather its owner. The rule permitting a person to attack a statute only on constitutional grounds applicable to himself precludes appellant from raising this point. "The rule is well established . . . that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations. [Citations.] Petitioner has not shown that the statute is being invoked against him in the aspects or under the circumstances which he suggests, and hence may not be heard to complain." (In re Cregler, 56 Cal.2d 308, 313; People v. Maugh, 1 Cal.App.3d 856, 862; compare In re Davis, 242 Cal.App.2d 645, 666.)

Appellant also attacks the constitutionality of this section on the additional ground that it goes beyond the area of legitimate state control. His position is that a state can only make criminal the dissemination of obscene material to juveniles, unwilling adults, or the "pandering" of such materials to prurient interest. This position was rejected by the California Supreme Court in *People v. Luros,* 4 Cal.3d 84. Here, as in *Luros,* evidence discloses commercial distribution of obscene material. The films in the present case were sold for $70.00.

Appellant also argues that the jury was misinstructed as to the definition of the word "knowingly" as used in Penal Code section 311(e) and Penal Code section 311.2. The sale of the films occurred on November 7, 1969, and it is the law on that date which applies here.

Between 1961 and 1969, Penal Code section 311(e) provided that "knowingly" meant having knowledge that the matter was obscene. Prior to 1961, the prosecution had to establish that the defendant knew the content of the material but it was not necessary to show that he also knew it was obscene. (People v. Harris, 192 Cal.App.2d Supp. 887, 892, reversed on other grounds; In re Harris, 56 Cal.2d 879; People v. Williamson, 207 Cal.App.2d 839, 846, disapproved on other grounds, In re Giannini, 69 Cal.2d 563, 577.) In 1961 this section was amended to provide that the defendant had to have knowledge that the matter was obscene. This was not interpreted to mean knowledge that a court would decide the matter was obscene. A reasonable construction was held to be that "[t]he defendant must have known the contents of the material, and must have been in some manner aware of its obscene character." (People v. Campise, 242 Cal. App.2d Supp. 905, 915.) Penal Code section 311(e) was amended, effective November 10, 1969, to provide that "'[k]nowingly' means being aware of the character of the matter . . . ."

The instructions as to knowledge given in the case at hand are as follows: "The word 'knowingly' as used in the context of Penal Code Section 311.2, means that each of the defendants must have known

the contents of the material, and must have been in some manner aware of its obscene character. It is not necessary to construe 'knowledge that the matter is obscene' as meaning that each of the defendants knew that a Court would decide the matter to be legally obscene, . . .

"Nor is direct evidence that each of the defendants has personally viewed the films in question necessary, for knowledge may be established by circumstantial evidence."

The jury was instructed properly either under the statute as it stood prior to 1969 (People v. Campise, supra; People v. Pinkus, 256 Cal.App.2d Supp. 941, 949-950) or under its later amendment. There was no necessity, as appellant contends, to repeat the definition of obscenity and require the jury to find appellant had knowledge of the presence of all elements of such a definition.

Appellant also complains of the following instructions: "In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled in [sic] a matter for you, the Jury, to determine.

* * *

"Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter [is] utterly without redeeming social importance."

These instructions conform to the language of Penal Code section 311(a)(2) which was added to the statute in the 1969 amendment. In 1966 the Supreme Court in *Ginzburg v. United States,* 383 U.S. 463 recognized the probative value of evidence a defendant was exploiting, for commercial purposes, material openly advertised to appeal to the erotic interest of his customers, an activity referred to as "pandering." In 1967 the California Supreme Court in *People v. Noroff,* 67 Cal.2d 791, 793, pointed out that the Legislature had not created the crime of pandering. The court did not, however, disapprove of any use of evidence of pandering for its probative value on the issue of whether the material was obscene. It merely rejected the concept of pandering of nonobscene material as a separate crime under the existing laws of California.

The 1969 amendment did not make pandering of nonobscene material a separate crime. Rather it clarified the use to which evidence of pandering might be made in the determination of whether one of the requirements of obscenity existed, *i.e.,* lack of any redeeming social value. It did not aggravate the

punishment for the offense, create a crime which did not previously exist, or deny the accused a vested defense. The application of the amendment to the appellant's trial does not contravene the constitutional doctrine prohibiting ex post facto laws. (See People v. Bradford, 70 Cal.2d 333, 343-344, fn. 5; People v. Snipe, 25 Cal.App.3d 742, 747-748.)

Appellant also contends that there is no substantial evidence to support a finding that the films in question went beyond the "customary limits of candor" or that the predominant appeal of the films was to the "prurient interest" of the average person, as required by section 311 et seq. of the Penal Code.

"'Obscene matter' means matter, taken as whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." (Pen. Code, § 311(a); see Roth v. United States, 354 U.S. 476, 488-489.)

The test of community standards applies to the questions of whether the predominant appeal of the material is to "prurient interest" and also to the question of whether the material exceeds the "customary limits of candor." (In re Giannini, supra, 69 Cal.2d 563, 572-574.) A statewide rather than a national standard is applicable to judge community

standards where the subject matter is "obviously not intended for nationwide dissemination." (In re Giannini, supra, at 579.) The prosecution, in order to bear its burden of proof, must introduce evidence of community standards through expert testimony, since the judge or jury, which makes the initial factual determination, and later the appellate court, which must reach an independent decision as to the obscenity of the material (Zeitlin v. Arnebergh, 59 Cal.2d 901, 908-909), do not compose a cross-section of the community. (In re Giannini, supra, at 574-576.)

To establish that these films exceeded the contemporary community standards of candor in California, the People presented Officer Barber of the Los Angeles Police Department. The trial court ruled that he was "qualified to give his opinion in the area of obscenity, the general area of obscenity." He had viewed the films in question as well as other films brought to the attention of his department during the period in question. He testified that the depiction on film of close-ups of sexual intercourse, oral copulation, sodomy and masturbation were beyond the customary limits of candor in the State of California. There was no evidence to the contrary. A viewing of the films indicates they do depict these activities.

Appellant objects to the testimony of Officer Barber as an expert witness but it is clear that this officer's interviews and studies of interviews for a state survey, the questioning of laymen, and participation in civic panels were directed toward ascertain-

ing the standards of the community in the area of obscenity. We have concluded that the court did not err in admitting this testimony and in instructing the jury regarding the weight to be given it.

The other expert witness for the prosecution was Dr. Peschau who testified that he had experience in evaluating the psychologically healthy, as well as the mentally ill and sexually disturbed. He testified that, in his opinion, the predominant appeal of the films was to a prurient interest. Appellant's objections to his qualifications and opinion go to the weight of his testimony.

The fact that Dr. Peschau and Officer Barber expressed their opinions in terms of ultimate facts does not render their testimony inadmissible. (Evid. Code, § 805; People v. Cole, 47 Cal.2d 99, 105.) The jurors were instructed that they were not bound by the testimony of the experts but should give it the weight to which they found it to be entitled and disregard it if they found it to be unreasonable.

We have viewed the movie films and have concluded that the jury did not err in its findings of obscenity.

The judgment is affirmed.

Brown (H. C.), J.

We concur:

Draper, P. J.

Caldecott, J.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Three

BRIEF FOR PETITIONER

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OCTOBER TERM, 1976

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Three, affirming the judgment of the trial court was filed on March 29, 1976, but has not been and will not be officially reported and published. See *California Rules of Court,* Rule 976. The opinion is set out in full as Appendix A of the Petition For Certiorari.

JURISDICTION

On June 22, 1971, Petitioner was convicted in the Superior Court of the State of California for the

County of San Mateo of a violation of California Penal Code Section 311.2, the obscenity statute. (A 15, 26) On July 26, 1971, judgment was entered upon the conviction and an appeal was timely perfected in the California Court of Appeal, which affirmed the judgment in an opinion filed on January 11, 1973. (A 18) A Petition for Hearing in the California Supreme Court was timely filed on February 16, 1973, and was denied without opinion on March 8, 1973. (A 18-20)

A Petition for Certiorari was then filed with this Court. Certiorari was granted, the judgment of the Court of Appeal was vacated and the case was remanded for reconsideration in light of *Miller v. California,* 413 U.S. 15, and its siblings. *Splawn v. California,* 414 U.S. 1120.

Thereafter, the California Court of Appeal once again affirmed the conviction. A Petition for Hearing before the California Supreme Court was denied on May 26, 1976, by an order, a copy of which is set out as Appendix B of the Petition for Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I, provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press; or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment XIV, provides, in material part, that:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. California Penal Code Section 311.2 provided, at the time of this case, that:

> (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.
>
> (b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place where he is so employed.

4. California Penal Code Section 311 provided, at the time of the offense, Stats. 1961 ch. 2147, that:

(a) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters, and is matter which is utterly without redeeming social importance.

(b) "Matter" means any books, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means having knowledge that the matter is obscene.

5. United States Constitution, Article I, Section 10, provides, in part, that:

No State shall . . . pass any . . . ex post facto Law.

QUESTIONS PRESENTED

1. Was Petitioner subjected to an *ex post facto* application of California obscenity law where he was convicted by the use at trial of a "pandering" law

which was not in force at the time of the offense and with which he was not charged in the Information?

2. In an obscenity prosecution of a retail bookstore owner not shown to have any connection with the creator or publisher of the matter in question, is it constitutional to instruct the jury that the financial motives of the creator of the material could be considered evidence that the material was "obscene"?

3. Is a retail bookstore owner denied due process when his conviction of an obscenity violation is based on the motives and behavior of persons with whom he has no connection and over whom he has no control?

4. Is an obscenity conviction premised upon "pandering" constitutionally permissible where there is no evidence of commercially exploitative behavior by the defendant?

STATEMENT OF THE CASE

Petitioner, Roy Splawn, his brother Don and one other person, Robert Esselstein, were charged, on November 19, 1969, with one count of felony conspiracy. (A 22) The Complaint and subsequently the Information, each charged a conspiracy to commit a misdemeanor violation of California Penal Code §311.2, the California obscenity statute. The conspiracy was charged to have commenced on August 1, 1969, and to have terminated on November 7, 1969. Each defendant was also charged with a misdemeanor Penal Code §311.2 obscenity violation. After pleas of not guilty,

and appropriate motions, which were denied, jury trial started on June 7, 1971. (A 2) On June 18, the People moved to dismiss the charges against the defendant Esselstein, which motion was granted. On June 22, the jury returned verdicts of Not Guilty as to all counts against Donald Splawn, a verdict of Not Guilty as to the Felony Conspiracy count against petitioner Roy Splawn, and a verdict of Guilty against petitioner Roy Splawn on the misdemeanor count of violation of California Penal Code Section 311.2—the obscenity statute. (14-15, 25-28)

On July 26, petitioner's motion for probation was denied and he was sentenced to ninety-one (91) days in the County Jail, one (1) day suspended, and ordered to pay a fine of one thousand dollars ($1,000.00) plus state assessment. (A 29-31) Bond on Appeal of twelve hundred fifty dollars ($1,250.00) was posted and the execution of the sentence stayed pending appellate review. (A 29)

EVIDENCE AND INSTRUCTIONS

I

On July 31, 1969, a Redwood City, California, reserve police officer, who was a carpetlayer by trade, went, in an "undercover" capacity, to a bookstore owned by petitioner. (R.T. 27-8).[1] There he found petitioner's brother, Don, working behind the sales counter. The policeman asked to see petitioner Roy

[1] "R.T." refers to the Reporter's Transcript. "C.T." refers to the Clerk's Transcript.

Splawn, about purchasing some "hard-core" films. (The term appears to have been first used by the officer. (R.T. 320).) (R.T. 28). Although the store sold materials with sexual content, no such films were carried in the store. (R.T. 28, 318-321, 516-7, 573-5). In fact, the police knew this, for they had made purchases of material regularly for sale in defendant's store, but no prosecutions had been commenced as a result of those purchases. (R.T. 381).

The officer was told to return the next day. (R.T. 29). When he so returned neither petitioner Roy Splawn nor the requested films were present (R.T. 30).

The officer left and the matter was apparently dropped until November 4, 1969. On November 4 and 5, the officer made repeated contacts with Don Splawn in an attempt to buy films, which were still not for sale in the store. (R.T. 32). Finally, in the evening of November 5, the officer found petitioner Roy Splawn in the store, and told him he wanted "hard-core" movies. (R.T. 46-47).

Petitioner told the officer that he did not have any such films but that he could get them from San Francisco. (R.T. 47). The officer told Splawn that he was in a hurry to get the films, and Splawn told the officer that he, the officer could, if he wished, go to San Francisco and get them himself. (R.T. 338). The officer declined this offer.

On November 7, 1969, the officer came to petitioner's store, where he obtained from Robert Esselstein, a clerk, a package containing two reels of film

which graphically displayed sexual behavior, for which he paid seventy dollars. (R.T. 5, 96).

Roy Splawn was convicted for distributing those two reels of film.

II

The offense of which Petitioner was convicted was not charged by the prosecution in the context of the circumstances of production, distribution or publicity of the films in question. No reference to any pandering activity is found in the Information. (A 22)

Three days *after* the date of Petitioner's offense, an amendment to California's obscenity law became effective, which provided that:[2]

> In prosecutions under this chapter where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

P.C. 311(a)(2), effective November 10, 1969; see California Codes, Effective Dates of Laws, 1969.

Nevertheless, the trial court permitted photographs which showed the condition of the premises to be introduced into evidence on the issue of the obscenity of the material. (R.T. 77-83). The trial court instructed the jury on the issue of "pandering", as follows:

> (1) [I]n determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled is a matter for you, the Jury, to determine. (R.T. 882). (A 38)
>
> (2) Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter [is] utterly without redeeming social importance. (R.T. 883). (A 39)
>
> (3) If the object of work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, this may be considered as evidence, that the work is obscene. (R.T. 883). (A 40)

[2]Without this amendment, the California Supreme Court had held that the prosecution could not go to the jury on a "pandering" theory, at least where "pandering" was not charged in the indictment or information. ***People v. Noroff,*** 67 C.2d 791 (1967).

HOW THE FEDERAL QUESTIONS ARE PRESENTED

1. Petitioner objected to the trial court's instructions on pandering (R.T. 755-758) and to the introduction of evidence of pandering (R.T. 77-83) and both on appeal (Appellate's Brief p. 30-33) and in his Petition for Hearing in the California Supreme Court (p. 17-19) urged:

(a) that the giving of any "pandering" instructions constituted a retroactive *ex post facto* application of the law and

(b) that the instructions given on "pandering" denied him both his due process and free speech rights under the federal constitution.

These contentions were rejected by the trial court, the Court of Appeal (Petition for Certiorari, Appendix A, pp. viii-ix), and inferentially, by the California Supreme Court (Appendix B).

SUMMARY OF ARGUMENT

I

The California Court of Appeal has here held that the state legislature, when it passed Penal Code Section 311(a)(2), intended to pass only an evidence rule which could be properly applied retroactively. But, as the statute permitted a conviction on less and different evidence, denied Petitioner a vested right, made behavior criminal which had been innocent, and affected petitioner to his detriment, the statute's retroactive application to Petitioner was an *ex post facto* application of the law in contravention of Article I, Section 10 of the United States Constitution.

Further, the California Supreme Court in 1967 had held, in *People v. Noroff*, 67 C.2d 791, that "pandering" evidence could not be used to obtain a conviction absent an enabling statute. The application of pandering doctrine to petitioner in the absence of statute was thus unexpected and indefensible, and therefore deprived Petitioner of due process fair warning. *Bouie v. Columbia*, 378 U.S. 347.

II

A.

The facts of this case fail to show commercially exploitative behavior by Petitioner and the California Court referred to none. Yet California pandering law was applied at Petitioner's trial. Because California pandering law does not permit fair consideration of the entire context of a sale of sexual material but focuses only on exploitative behavior, its application must be limited to cases where such behavior can be fairly said to exist. Thus, because California pandering doctrine was applied to non-exploitative commercial activity which is constitutionally protected, it was applied in a constitutionally overbroad manner. And because the pandering law was applied in the absence of evidence of exploitation, petitioner was denied due process.

B.

The construction of California law by this case, and by *People v. Kuhns,* 61 C.A.3d 735, has resulted in a state statute which on its face is unconstitutionally uncertain, in that it is both overbroad in a first amendment sense and vague in a due process sense.

III

The instructions given in this case permitted the jury to make determinations about the nature of the material based on its sexual provocativeness, and based on the motives and behavior of persons who were not on trial. These instructions exceed the limits of permissible constitutional uncertainty and are overbroad and vague. Additionally, permitting the material to be judged by the behavior of others with whom petitioner had no connection denied him due process.

The cumulative effect of the errors resulted in an unfair, unconstitutional conviction.

ARGUMENT

I

PETITIONER WAS UNCONSTITUTIONALLY SUBJECTED TO AN EX POST FACTO APPLICATION OF CALIFORNIA "PANDERING" LAW.

A.

In 1961, California enacted its obscenity law, California Penal Code Section 311 et seq., patterned upon the then current obscenity doctrine of this Court.

In 1966 this Court decided *Ginzburg v. U.S.,* 383 U.S. 463, which held, for the first time, that in federal obscenity cases, under appropriate circumstances, the evidence relevant to a determination of the character of the material in question could go beyond the four corners of the material to evidence of the behavior relative to the material of those on trial. Such behavior was characterized as "pandering".

In 1967, the California Supreme Court decided *People v. Noroff,* 67 C.2d 791. In *Noroff,* the trial judge had decided that the material in question was, on its face, not obscene as a matter of law. The State appealed, urging the trial court's ruling was erroneous because the State had a right to go to the jury on a "pandering" theory. *Id.* at 793. The California court rejected that position, holding that "pandering" evidence could not be used to obtain an obscenity conviction absent an enabling statute, at least where such behavior was not charged in the Indictment or Information. *Id.* at 793. The California Supreme Court specifically disapproved an earlier California Court of Appeal case, *Landau v. Fording,* 245 C.A.2d 820, which had suggested that "pandering" doctrine could be applied absent an enabling statute. *Noroff,* at 793.

In 1969, in apparent response to *Noroff,* the California legislature amended its obscenity law to add Penal Code Section 311(a)(2), which made "pandering" evidence potentially relevant to some aspects of an obscenity determination. At the time, the California constitution provided that laws went into effect sixty-one days after adjournment of the Legis-

lature, California Constitution Article 4, Section 8. Laws passed by the 1969 Legislature went into effect on November 10, 1969. See West's California Penal Code, "Effective Dates of Laws, 1969."[3]

Petitioner's conviction is for a sale of obscene material occurring on November 7, 1969, which sale allegedly involved behavior by Petitioner and others occurring from July 31 through November 7, 1969. At petitioner's trial, evidence was introduced on a pandering theory, and the jury was instructed on a pandering theory.

B.

A law which was not in effect when Petitioner engaged in the behavior for which he stands convicted was applied at his trial to determine his guilt. The basic question, whether petitioner was treated unconstitutionally, can be more specifically analyzed from two approaches. The California Court of Appeal has held, *Petition for Certiorari,* Appendix A, p. ix that the California Legislature intended "merely" to pass an evidence rule, which raises the question of whether the passage of the "pandering" statute, Section 311(a)(2), constitutes an *ex post facto* law when applied retroactively, in contravention of U.S. Constitution, Article I, Section 10. Alternatively, we can ask whether the California Court, when it applied the pandering law to Petitioner, engaged in judicial

[3]The statement of Respondent in its Opposition, pp. 6-7, that California obscenity law included the pandering sections at the time of petitioner's trial is incorrect, but the error appears inadvertent as Respondent used the correct date in the body of it Argument, see Opp., p. 13.

construction of a criminal statute which was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue such that its application to petitioner would deprive him of the due process fair warning to which he is entitled. *Bouie v. Columbia,* 378 U.S. 347, 354.

The guidelines for determining which laws are *ex post facto* have been succinctly stated:

a) A law that makes an act done before the passing of the law, which was innocent when done, criminal; *Calder v. Bull,* 3 Dall. 386, 390.

b) A law that alters the legal rules of evidence and permits the reception of less, or different, testimony than the law required at the time of the commission of the offense in order to convict. *Ibid.*

c) A law which takes away or impairs a defense which the law has provided a defendant. *Kring v. Missouri,* 107 U.S. 221.

d) A law passed after the commission of an offense which alters the situation of a party to his disadvantage. *Ibid.*

Application of the foregoing tests show that Petitioner has been subject to an *ex post facto* retroactive application of California law in violation of Article I, Sec. 10 of the U.S. Constitution.

The California law changed the evidence which could be presented to determine if material was obscene, from evidence that the matter itself was prurient, offensive and lacked value, to evidence which included the manner in which it was used or dis-

seminated.[4] Without Penal Code §311(a)(2), dealers in sexual material could rely solely on the content of the material in evaluating whether to deal with it. With §311(a)(2), dealers were required to evaluate the "circumstances" of marketing their material to determine if the material could be found to be obscene in context.

Perhaps most significantly, without §311(a)(2) dealers in California could market their sexual material any way they pleased. After §311(a)(2), the scope of their right to sell, disseminate or publish such material became severely limited.

The incorporation of a pandering doctrine into California obscenity law materially changed the focus of California obscenity trials from the material alone to the material as disseminated by those on trial.

The pandering doctrine does nothing to help a defendant defend his case. While the way he treats the material may be used to show lack of social value, a defendant can derive no benefit from the pandering doctrine no matter how carefully and seriously he treats the material. A defendant is required to assess another complex factor in an already complex field. Miscalculation has detrimental results but correct evaluation brings no reward. Under such circumstances, the California pandering law clearly alters

[4]And, under the instructions given here by the trial court, evidence of "sexual provocativeness", and "motives" of the "Purveyor" and "creator" became relevant where such evidence was not before.

a defendant's situation to his disadvantage, and, as such, constitutes an *ex post facto* law when applied retroactively to Petitioner.

An *ex post facto* retroactive application of the pandering law also denies a defendant due process. *Bouie v. Columbia, supra.* Here, petitioner had no notice that his marketing behavior could affect the question of the obscenity of the material, no notice that his behavior had to meet some standard, and no notice of the basis of the standard.

Not only did petitioner have no notice that he was under a duty to conform his behavior to some standard, but he was lulled into a false sense of security by the California courts. *Bouie, supra,* at 352. While Petitioner would not concede that California obscenity law was ever narrow and precise, it nevertheless, before §311(a)(2), limited itself to the material in question. In light of *People v. Noroff, supra,* which rejected a non-statutory pandering rule, the appearance to petitioner of the status of California law as of the time of his behavior, *Bouie, supra,* at 354, was such that the application of pandering law to his case was unexpected and indefensible, *Ibid.,* especially where no pandering charge was made in the Information. cf. *Cole v. Arkansas,* 333 U.S. 196.

Thus, petitioner has been denied due process and has been subjected to the retroactive application of a criminal law in violation of the *ex post facto* clause of Article 1, Section 10 of the United States Constitution.

II

CALIFORNIA PANDERING LAW HAS BEEN OVERBROADLY CONSTRUED BY THE CALIFORNIA COURT AND IMPROPERLY APPLIED TO PETITIONER TO CONVICT HIM IN THE ABSENCE OF EXPLOITATIVE BEHAVIOR.

A.

The only facts stated by the California Court of Appeal in this case are that petitioner Splawn was the owner of a bookstore and that he sold two films for $70.00. The record shows that the films were not regularly sold in his store, the films were never advertised, and the buyer had to make at least six attempts to obtain the film before he was successful.

This is not a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients, cf. *Miller v. California,* 413 U.S. 15. None of the facts in this case show commercial exploitation of the films sold. Therefore, if the pandering doctrine can be applied to Petitioner, it can be applied in every obscenity case. And if, as construed by the California Court, the pandering doctrine is applicable to petitioner and to every other obscenity defendant, then the pandering law is being applied overbroadly and therefore unconstitutionally.

Ginzburg v. U.S., 383 U.S. 463, while it permitted evidence of pandering, recognized that "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Id.,* at 474; *New York Times v. Sullivan,* 376 U.S. 254. The pandering doctrine is designed to permit control of excessive, exploitative behavior, not to penalize normal commercial activity.

The pandering doctrine relaxes and changes some of the requirements necessary to a finding of obscenity. It adds another complex factor and another layer of uncertainty to a field which, definitionally, appears to be at the limits of tolerable ambiguity. And, as formulated by the California legislature and construed and applied to booksellers, such as petitioner, it is an unfair rule which can be used by the prosecution to assist it in obtaining a conviction but cannot produce any benefit for a deserving defendant. The instructions here permitted the jury to consider behavior evidence to determine whether the material was obscene or lacked social value. But no corresponding instruction told the jury that it could consider lack of exploitation, or other behavior, as evidence that the material had value or was not obscene.

If the question of obscenity is to include "consideration of the setting in which the publications were presented", *Ginzburg, supra,* at 465, and if the central focus of the trial is to be the behavior of those on trial, *Roth v. U.S.,* 354 U.S. 476, Warren, C. J. concurring, then jury instructions should permit the jury to evaluate whether a defendant treated material in a neutral or in a serious way, as well as in an exploitative way. But California's law does not permit fair consideration of the entire context of a sale of sexual material; only the exploitative aspects are relevant.

To the extent, then, that California pandering rules are designed only to deal with exploitative behavior, they should be limited to situations where that behavior is present. If California's rules can be applied to change the nature of a trial where only non-ploitative commercial activity is present, then the pandering doctrine is being overbroadly applied to constitutionally protected behavior and is thus being unconstitutionally applied. *Gooding v. Wilson,* 405 U.S. 518; *Erznoznik v. City of Jacksonville,* 422 U.S. 205; *Hynes v. Mayor of Oradell,* ..... U.S. ....., 48 L.ed.2d 243; *Lewis v. New Orleans,* 415 U.S. 130.

Approaching this question from another point of view, it is unconstitutional to apply California pandering law in the absence of exploitative behavior, because it results in a conviction premised on behavior for which there is no evidence. *Vachon v. New Hampshire,* 414 U.S. 478. Where, as here, the record is devoid of evidence, even on one element, to support a conviction, the conviction must be reversed. *Taylor v. Louisiana,* 370 U.S. 154; *Johnson v. Florida,* 391 U.S. 596; *Garner v. Louisiana,* 370 U.S. 157; *Shuttlesworth v. Alabama,* 382 U.S. 87.

B.

Petitioner filed his Petition for Certiorari on July 31, 1976. At that time Petitioner did not mount a facial attack upon California's pandering law, because a more selective and particularized approach appeared capable of achieving an appropriate result. Direct assault on the statute did not seem warranted.

Since the filing of the Petition, however, the California Court of Appeal has held that it is appropriate to apply pandering doctrine to a mere store clerk who had no control over, nor anything to do with, the production, presentation of publicity of the material or the store in which it was sold. *People v. Kuhns,* 61 C.A.3d 735 (9/8/76). It is thus now clear that California pandering law will be applied in all obscenity cases.

Under the circumstances, petitioner feels it necessary to assert that California pandering law is facially overbroad and vague and therefore unconstitutional. The Court will no doubt wish to consider whether this claim can be said to be fairly within the questions on which certiorari was granted. See Supreme Court Rules, Rules 40(a)(1) and (2).

The law is overbroad because, as construed, every type of vending or display, no matter how neutral or restrained, can be argued to be pandering. *Erznoznik v. Jacksonville, supra.* Under *Kuhns,* even knowledge alone by an employee without authority can be argued to be pandering. Thus, protected speech activity can be attacked, limited and proscribed under the law. Alternatively, the law is vague because it fails to give notice of what a dealer or employer can do to avoid pandering. *U.S. v. Harris,* 347 U.S. 612.

Several examples will suffice.

1. The retail dealer can limit the material in his store to that with sexual content. He can acquire material by purchase or consignment and display the

covers of the material to customers. Magazines and books are universally sold by a display of their covers. The virtue of this way of doing business is that the dealer can avoid problems with juveniles and persons who are offended by sexual material who might come into the store for other items if they were available.

However, under California's law, the dealer could be accused of pandering on the theory that the concentrated display of sexual magazines and book covers was exploitative.

2. To avoid the charge that he is concentrating on sexual material, the retailer now branches out to a general magazine store. While he may avoid pandering problems, he is subjected to complaints from persons who do not wish the material exposed and available and has a continual discipline problem with juveniles who now have an excuse to come into the store. The retailer now rightfully concerned that he will be prosecuted for display of harmful sexual matter to juveniles, perhaps solely on the basis of the covers of the material. See, for example, California Penal Code Sections 313 *et seq.; Ginzburg v. New York,* 390 U.S. 629.

3. To avoid the problem with juveniles, the retailer then creates a special section for the sexual material, controls access to the area, and indicates generally that the material is "adult". Under California law, the dealer can still be charged with pandering, on the theory that he has called attention to his sexual material by segregating it, and impliedly

suggested that it is potentially prurient by treating it differently than other material. Even his use of the term "adult" with respect to the material is subject to a charge of pandering, on the theory that the term "adult" is now a euphemism for sexually graphic material.

4. The clerk in the retailer's store who has no authority over what stock is sold or how it is displayed would like to know how he can avoid a charge that he is a panderer if he sells the sexual material in the store. The answer is, apparently, that he cannot.

The above examples indicate how the overbroad and vague interpretation and application of California pandering law seriously affects the exercise of the first and fourteenth amendment rights of retail vendors such as petitioner. cf. *Dombrowski v. Pfister,* 380 U.S. 479. The open ended interpretation of the statute by the California Courts afford ample opportunity for abusive application. cf. *Lewis v. New Orleans, supra,* Powell, J. concurring.

III

CALIFORNIA PANDERING LAW, AS CONSTRUED AND APPLIED, IS UNCONSTITUTIONALLY UNCERTAIN AND IMPERMISSIBLY PERMITS THE MATERIAL IN QUESTION TO BE JUDGED BY THE BEHAVIOR OF PERSONS NOT ON TRIAL; THESE INFIRMITIES CUMULATIVELY DENIED PETITIONER HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FREE SPEECH.

A.

The constitutional rules which require definiteness have two bases. The due process basis is that a person has a right to fair notice that his contemplated conduct is forbidden before he can be punished for it. *U.S. v. Harriss,* 347 U.S. 612; *Lanzetta v. New Jersey,* 306 U.S. 451; *Bouie v. Columbia,* 378 U.S. 347. The free speech basis is that laws involving speech must be sufficiently specific so as not to infringe upon or inhibit protected speech. *Erznoznik v. Jacksonville, supra.* Underlying both notions is a concern that the trier of fact should have definite guidelines. *United States v. Petrillo,* 332 U.S. 1.[5]

Everyone now frankly recognizes that materials with sexual content are going to be regulated by standards which lack precision, *Miller v. California,* 413 U.S. 15, fn. 10; *Paris Adult Theater I v. Slaton,* 413 U.S. 49, Brennan, J. dissenting. A majority of this Court feel that the degree of ambiguity is constitutionally tolerable. *Ibid.* But it appears obvious

[5]Sometimes the two doctrines become intertwined, see *Cox v. Louisiana,* 379 U.S. 536, as a basis for this Court's action. Often this Court finds a statute to suffer from both overbreadth and vagueness, *Coates v. Cincinnati,* 402 U.S. 611; *Keyishian v. Bd. of Regents,* 385 U.S. 589.

that we are close to the limits of acceptable uncertainty and that our notions of prurience, offensiveness and seriousness need refining, not expanding.

It would seem that the Court agrees, for attempts to enlarge the definitions regulating sexual material have uniformly failed. Thus, for example, this Court has struck down laws seeking to censure material which was offensive and vulgar, *Cohen v. California,* 403 U.S. 15, which could corrupt public morals, *Ashton v. Kentucky,* 384 U.S. 195, which could "appeal to the lust of persons under eighteen or to their curiosity as to sex or to anatomical differences between sexes," *Rabeck v. New York,* 391 U.S. 462, and which involved "sexual promiscuity", *Interstate Circuit v. Dallas,* 390 U.S. 676. See *Id.,* at 682, and fn. 10.

The construction given California pandering law by approval of the instructions in this case suffers from both vices of indefiniteness: it is vague and overbroad, and thus constitutionally intolerable for regulating sexual material.

1. The instructions permit evidence of sexual provocativeness to determine the presence of social importance. But sexual provocativeness is not prurience. Sexual provocativeness has been part of our culture for decades. Pin-ups are part of our American heritage. Everything from cars to chewing gum has been sold using sexually provocative methods. Changing the test from prurience to provocativeness crosses the line of permissible ambiguity not only because it undercuts this Court's First Amendment requirements for obscenity but because it is too vague to

give fair notice and guidance to citizens and juries. It is at least as vague as "sexual promiscuity", *Interstate Circuit v. Dallas, supra.*

And if the presence of prurience and the absence of social value are viewed as two sides of the same coin, see *A Book v. Attorney General,* 383 U.S. 413, White, J. dissenting, then provocativeness cannot become part of the obscenity test without substantial distortion of the entire definition.[6]

2. The instructions make the financial motives of the creator evidence that the material is "obscene", which means evidence that material is prurient, offensive, and without value. Requiring, in the obscenity field, that one assess the motives of another to determine the character of the material in ques ion is so general and vague that no fair notice is possible and is hardly anything more than an invitation to a jury to apply its uninformed prejudices.

B.

> The main principle of just criminal punishment, one that is generally regarded as self-evident, is that one shall never be answerable for the crime of anyone else . . .
>
> Cohen, Moral Aspects of Criminal Law, 49 Yale L.J. 987, 1007.

[6]It should also be noted that insofar as the instruction permits the existence of one fact, sexual provocativeness, to form the basis for an inference that another fact exists, lack of social value, the instruction suggests other constitutional difficulties. cf. *McFarland v. American Sugar Refining Co.,* 241 U.S. 79; cf. *Pollock v. Williams,* 322 U.S. 4.

In this case, the trial of a retail seller, the jury was told that circumstances of production could be considered to determine if exploitation was present, and was told to look to the "purveyor's" emphasis, and to look to financial motives of the creator of the material to determine if the material was obscene. These instructions invited the jury to refocus on the material and judge it with reference to the motives and behavior of persons who were not on trial and with whom petitioner had no connection.

The instructions stood the pandering doctrine on its head, for that doctrine is supposed to relate determination of the character of the material to its treatment by a defendant. Instead, the character of the material was determined relative to its treatment by others not on trial. This is, fundamentally, a denial of due process. It frankly permitted petitioner to be convicted because of his association with the material and with asserted behavior patterns and characteristics of those who created and produced the material. This is guilt by association, roundly condemned in *DeJonge v. Oregon,* 299 U.S. 353.

C.

It is clear that California's error has been to unthinkingly graft a new doctrine, narrowly applied to a specific set of facts by this Court, onto its state obscenity law, and then try to apply it broadly to every obscenity defendant. The error was compounded by the unfortunate selection of isolated passages from

Ginzburg, which involved a creator and producer, and their application to petitioner, a retail vendor.

Perhaps some of these instructions might be proper in another context, involving a defendant with a different status. Perhaps the law can still be saved by a narrowing construction. Here, however, the cumulative effects of the lack of certainty and the misfocus on the behavior and motives of others combined to deny petitioner his rights.

CONCLUSION

For the foregoing reasons, Petitioner requests this Court to reverse his conviction.

Dated, January 6, 1977.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN,
Petitioner,

VS.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Three

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Three, was filed on March 29, 1976, and was certified for nonpublication pursuant to *California Rules of Court,* Rule 976. It has therefore neither been officially reported, nor published. The opinion is set forth in full as Appendix A to the Opposition of Respondent to Petition for Writ of Certiorari filed herein on November 5, 1976. That opinion was rendered after this Court vacated an earlier judgment of the California Court of Appeal filed

on January 11, 1973. See *Splawn v. California,* 414 U.S. 1120 (1974). Pursuant to *California Rules of Court,* Rule 976, this earlier opinion was neither officially reported nor published, but is fully set forth as Appendix B of the Opposition of Respondent to Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code, section 1257(3).

STATEMENT OF THE CASE

Proceedings in the State Courts.

On April 3, 1970, an Information was filed in the Superior Court of the State of California for the County of San Mateo, by which petitioner (together with co-defendants Don Splawn and Robert Esselstein) was accused of the following: *COUNT I*—Conspiracy to commit a crime, to wit: violation of California Penal Code section 311.2, in violation of California Penal Code section 182, a felony; and *COUNT II*—distribution of obscene matter in violation of California Penal Code section 311.2, a misdemeanor (Appendix, pp. 22-24). Jury trial commenced on June 7, 1971, and concluded on June 21, 1971, when the jury returned verdicts by which petitioner was found guilty of a violation of California Penal Code section 311.2 (Appendix, p. 15). Timely notice

of appeal to the California Court of Appeal was filed, and petitioner was admitted to bail pending that appeal.

On direct appeal petitioner raised nine issues, including an attack on the trial court's instructions concerning "pandering". That issue was resolved adversely to petitioner by the California Court of Appeal (See Opposition of Respondent to Petition for Writ of Certiorari, Appendix B, at pp. xviii-xx). Thereafter, petitioner sought a hearing before the California Supreme Court which was denied, without opinion, on March 8, 1973.

Proceedings in Splawn v. California, No. 73-200.

On January 7, 1974, this Court granted certiorari, vacated the judgment of the California Court of Appeal, and remanded the case "for further consideration in light of *Miller v. California,* 413 U.S. 15 (1973); *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973); *Kaplan v. California,* 413 U.S. 115 (1973); *United States v. 12 200-ft. Reels of Film,* 413 U.S. 123 (1973); *Roaden v. Kentucky,* 413 U.S. 496 (1973); and *Alexander v. Virginia,* 413 U.S. 830 (1973)."

Proceedings in the State Courts on Remand.

Upon receipt of this Court's order vacating its earlier judgment, the California Court of Appeal requested additional briefing on the constitutionality of the definition of "obscenity" as set forth in California Penal Code section 311(a). The California Court of Appeal reaffirmed petitioner's conviction on March 29, 1976, in an opinion which substantially republished,

without material difference, those portions of its earlier opinion rejecting petitioner's claim that the "pandering" instructions were improper. Petitioner's application to the California Supreme Court for a hearing was denied on May 26, 1976.

STATEMENT OF THE FACTS

Armand Drivon, a part-time employee of the Redwood City Police Department had known petitioner since 1966 when petitioner first offered "hardcore" pornography to Mr. Drivon (RT 44). In 1969, Mr. Drivon began negotiating with appellant's brother Don Splawn for the purchase of some "hardcore" films at petitioner's place of business, the Golden Gate Book Store located in Redwood City. Don Splawn advised Drivon that he had two "under-the-counter" films available for sale at a price of $50.00 apiece, but stated that these films were not carried in stock at petitioner's bookstore (RT 28). Several unsuccessful appointments were arranged for Drivon to pick up the films (RT 29-34). During the course of negotiations, Don Splawn assured Drivon that he would be completely satisfied with the films. Describing the "hardcore" films he told Drivon that they would be sucking toes, licking navels and everything else (RT 30). He also mentioned that the films were being supplied by petitioner (RT 33).

On November 4, 1969, Drivon met with petitioner at petitioner's bookstore to further discuss the purchase of these films (RT 35-36). Petitioner made a tele-

phone call in an attempt to locate some films then left the store returning a few minutes later. Petitioner told Drivon that he could obtain the films in two days, but if Drivon was in a great hurry petitioner offered to go to San Francisco to pick them up (RT 37). They settled on the price of the films, which petitioner stated were normally selling for much more in San Francisco. Petitioner also explained to Drivon that he had to be very careful in handling these films since they were "hardcore" material concerning which he had previously had trouble with the police (RT 46). Petitioner assured Drivon that he would be getting strictly "hardcore" material (RT 47).

When Drivon returned to petitioner's bookstore on November 7, 1969, the clerk gave him a package containing two reels of film in exchange for $70.00 (RT 47). Drivon thereafter contacted petitioner by telephone, and from their conversation it was apparent that petitioner had previously viewed these films (RT 72). Indeed, appellant admitted viewing the films prior to their sale (RT 633).

The films themselves were admitted into evidence (RT 97), were viewed by the California Court of Appeal and will be placed in the custody of the clerk of this court before the argument pursuant to Rule 38.

SUMMARY OF ARGUMENT

The sale of the two films forming the basis of petitioner's conviction occurred on November 7, 1969. Three days later a new section of California's Obscen-

ity Law, Penal Code section 311(a)(2) became effective. That section recognized the probative value evidence of circumstances of production and dissemination may have in determining whether the social value claimed for the material in question was the basis upon which it was traded in the marketplace or a spurious claim adopted only for the purposes of litigation. Petitioner contends he has been subjected to an *ex post facto* application of this section and, that the jury instructions based on this section were unsupported by the evidence resulting in his being convicted of "pandering".

Respondent contends that the circumstances of production and dissemination are relevant to the definitional requirements for a finding of obscenity [*Ginzberg v. United States,* 383 U.S. 463, 470-471 (1966)] rather than an element of the culpable conduct, selling obscene matter. The receipt of this evidence and the giving of the challenged instructions did not therefore result in petitioners being convicted of "pandering". *Hamling v. United States,* 418 U.S. 87, 130 (1974). Nor, has petitioner been subjected to an *ex post facto* application of this section, which merely codified the previously recognized relevance evidence of circumstances of production and dissemination have on the issue of social importance. *Luria v. United States,* 231 U.S. 9, 27 (1913); *Thompson v. Mississippi,* 171 U.S. 380, 386-388 (1898); *Hopt v. Utah,* 110 U.S. 574, 587-590 (1884); *Ward v. California,* 269 F.2d 906, 907 (9th Cir. 1959).

ARGUMENT

THE JURY WAS PROPERLY INSTRUCTED THEY COULD CONSIDER EVIDENCE OF THE CIRCUMSTANCES OF PRODUCTION AND DISSEMINATION AS RELEVANT TO DETERMINING WHETHER SOCIAL IMPORTANCE CLAIMED FOR THE MATERIAL WAS IN THE CIRCUMSTANCE PRETENSE OR REALITY.

Petitioner was convicted of distributing obscene material, a violation of California Penal Code section 311.2. This is the second time his conviction has been before this Court. In 1973 petitioner attacked the validity of his conviction alleging that California's statutory definition of obscenity, California Penal Code section 311, was unconstitutional. This Court vacated the judgment and remanded the case for reconsideration of the statute in light of *Miller v. California,* 413 U.S. 15 (1973). *Splawn v. California,* 414 U.S. 1120 (1974). Petitioner's conviction was reaffirmed (See Appendix A of Petition for Writ of Certiorari). California's statutory definition of obscenity, as authoritatively construed by our courts, is constitutional [*Hicks v. Miranda,* 419 U.S. 1018 (1975); *Bloom v. Municipal Court,* 16 Cal.3d 71, 127 Cal.Rptr. 317 (1976)] a point petitioner no longer contests. Neither, does he assert that the material he sold is not obscene. Instead, petitioner now contends that because the jury was instructed that they could consider whether his sole emphasis in selling these films was on their sexually provocative aspects to determine whether they were utterly without redeeming social importance (Appendix, p. 39), that he has been unconstitutionally subjected to an *ex post facto*

application of California Penal Code section 311(a)(2).[1] Alternatively, petitioner asserts these jury instructions, based on California Penal Code section 311(a)(2), are unconstitutionally overbroad, in that they subjected him to prosecution for the acts of another not on trial, namely the creator of the material (Appendix, p. 40), and that these instructions were unwarranted because there was no evidence of commercial exploitation sufficient to support them.

Respondent contends that California Penal Code section 311(a)(2) recognizes, as a procedural rule of evidence, the probative value that circumstances of production and dissemination have on the issue of the social importance, or lack thereof, of the material in question. We therefore respectfully submit petitioner's conviction has not been obtained through the use of unconstitutionally overbroad instructions, or the *ex post facto* application of this statute.

A. Circumstances of Production and Dissemination are Relevant to Determining whether the Questioned Material has Social Importance.

Petitioner argues that it was impermissible to allow the jury to consider evidence of the circumstances of production and dissemination in determining whether the two films in question were obscene. He contends such evidence is constitutionally admissible only when

[1]There is no dispute between the parties that California Penal Code section 311(a)(2), though passed by the Legislature and signed by the Governor prior to the date petitioner sold the films in question, November 7, 1969 (Appendix, p. 24), did not become effective until three days later; five months later the Information accusing petitioner of selling obscene matter was filed (Appendix, p. 22). Cf. Brief for Petitioner, p. 14, fn. 3.

the creator or producer of the material is on trial. This argument is based on an erroneous premise, resulting from petitioner's use of the verb "pandering" to characterize his offense, that the circumstances of production and dissemination are elements[2] of the substantive offense of which he has been convicted. Respondent contends circumstances of production and dissemination are relevant to the definitional requirement of obscenity that it lack serious literary, artistic, political, or scientific value. *Miller v. California,* 413 U.S. 15, 24 (1973).

The offense of which petitioner stands convicted (Appendix, p. 26) has two elements: (1) the knowing sale of; (2) obscene matter. "Obscene matter" is defined by California Penal Code section 311(a) as matter, taken as a whole: (a) the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest; (b) which goes substantially beyond customary limits of candor in description or representation of such matters; and (c) which is utterly without redeeming social importance. California Penal Code section 311(a)(2) recognizes that:

> "In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate the

[2]Petitioner's premise might have merit had he been convicted of violating California Penal Code section 311.5, which was amended at the same time as section 311(a)(2) was adopted and provides:

> "Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented to be obscene, is guilty of a misdemeanor."

matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance."

After the jury in petitioner's case was fully instructed on the three factors essential to a finding that the questioned material is obscene, they were further instructed:

> "Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyors sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance.
>
> If the object of [the] work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, this may be considered as evidence that the work is obscene." (Appendix, p. 39-40).

Finding an opinion of Judge Learned Hand [*United States v. Rebhuhn,* 109 F.2d 512 (2nd Cir. 1940)] persuasive authority, this Court concluded in *Ginzberg v. United States,* 383 U.S. 463 at 470-471 (1966), that evidence of the circumstances of presentation and dissemination of questioned material are relevant to determine whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim adopted only for the purpose of litigation. This Court concluded that where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. The fact that the materials originate or are used as a subject of pandering is relevant to the application of the test of obscenity detailed in *Roth v. United States,* 354 U.S. 476 (1956) which is the basis of California Penal Code section 311. The fundamental notion that evidence of production and dissemination may serve to tip the balance toward a finding of obscenity first appeared in the separate opinions of Chief Justice Warren in *Roth v. United States,* 354 U.S. at 495 (concurring opinion) and *Jacobellis v. Ohio,* 378 U.S. 184, 201 (1964) (dissent). It took firmer root in the opinion of Mr. Justice Brennan (joined by the Chief Justice and Mr. Justice Fortas), delivering this Court's judgment in *Memoirs v. Massachusetts,* 383 U.S. 413, 420 (1965), before reaching full bloom in the majority opinion in *Ginzberg, supra.* The probative value of such evidence has been widely recognized by federal courts. *Cf. United States v. Palladino,* 475 F.2d 65, 70-71 (1st Cir. 1973); *Milky Way Productions, Inc. v. Leary,* 305 F.Supp. 288, 294 (S.D.N.Y. 1969) (three judge court) affirmed, 397 U.S. 98 (1970). Finally, and significantly, this Court recently rejected a challenge to these instructions which was based on an objection, substantially the same as that raised by petitioner here.

"Finally, we similarly think petitioner's challenge to the pandering instruction given by the district court is without merit. The district court instructed the jurors that they must apply the three-part test of the plurality opinion in *Memoirs v. Massachusetts,* 383 U.S. at 418, and then indicated that the jury could, in applying that test, if it found the case to be close, also consider whether the materials had been pandered by looking to their '[m]anner of distribution, circumstances of production, sale, . . . advertising. . . . [and] editorial intent. . . .' App. 245. This instruction was given with respect to both the Illustrated Report and the brochure which advertised it, both of which were at issue in the trial.

> *"Petitioners contend that the instruction was improper on the facts adduced below and that it caused them to be 'convicted' of pandering. Pandering was not charged in the indictment of the petitioners, but it is not, of course, an element of the offense of mailing obscene matter under 18 U.S.C. section 1461. The district court's instruction was clearly consistent with our decision in Ginzberg v. United States, 383 U.S. 463 (1966), which held that evidence of pandering could be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition of obscenity is applied."* *Hamling v. United States,* 418 U.S. 87, 130 (1974) (Emphasis added).

It must be recognized that here, as in *Hamling,* the jury was fully instructed that in order to convict they had to find, *beyond a reasonable doubt,* each of three factors which constitutionally define obscenity (Appendix, p. 35). The questioned instructions therefore

were clearly consistent with *Ginzberg,* and merely indicated the probative value evidence of production and dissemination may have in determining social value.

This Court decides obscenity cases "not merely to rule upon the alleged obscenity of a specific film or book but to establish principles for the guidance of lower courts and legislatures." *Jacobellis v. Ohio,* 378 U.S. 184, 200 (1964), [Warren C. J., dissenting]. Mindful of this admonition, California courts have consistently held Penal Code section 311(a)(2) does not create a new substantive offense. *People v. Noroff,* 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967); *People v. Kuhns,* 61 Cal.App.3d 735, 132 Cal.Rptr. 725 (1976). Nor, as urged by petitioner, did this statute permit his conviction based on evidence of acts which were legitimate when committed. It was illegal to sell obscene matter in California long before the sale which occurred in this case. California Penal Code section 311.2 (added by Statutes 1961, chapter 2147); *People v. Aday,* 226 Cal.App.2d 520, 38 Cal.Rptr. 199 (1964), *cert. denied,* 379 U.S. 931. *Landau v. Fording,* 245 Cal.App.2d 820, 824, 54 Cal.Rptr. 177, 179-180 (1960), affirmed per curiam, 387 U.S. 456 (1967) (disapproved in *People v. Noroff,* 67 Cal.2d 791, 793, 63 Cal.Rptr. 575, 576 (1967), insofar as it suggested that California recognized a crime of "pandering" non-obscene material). Respondents respectfully submit therefore that California Penal Code section 311(a)(2) properly states a law of evidence well within recognized constitutional guidelines.

B. The Challenged Instructions were Properly Given in Petitioner's Case.

1. The Instructions are not Constitutionally Overbroad.

Petitioner, somewhat inconsistently, acknowledges this Court's recognition in *Ginzberg v. United States, supra,* of the probative value which evidence of the circumstances of production and dissemination can have in determining social value while seizing on one phrase from that opinion[3] to argue that the application of this rule must be limited to "close cases", a term he does not otherwise define, to avoid the vice of unconstitutional overbreadth. Respondent submits petitioner has misconstrued this court's meaning. Based solely on its content, absent evidence of production and dissemination, little material can be said to be obscene as a matter of law. Hence, in the context of an obscenity prosecution where the admissibility of evidence of production and dissemination is relevant to the issue of the material's obscenity, "close case" can only refer to the majority of cases where the material may, in some context, have redeeming social value. The closer the issue the greater the danger to First Amendment guarantees. Since this evidence could properly be admitted in a close case, it was properly admitted here. *Compare, Hamling v. United States,* 418 U.S. 87, 130 (1974).

Ginzberg simply did not limit the probative value of this evidence to cases where the social value

[3]The phrase "close case" appears in the following context, "We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test." 383 U.S. at 474.

of the material in question is close or ambiguous. *Milky Way Productions, Inc. v. Leary,* 305 F.Supp. 288 (S.D.N.Y. 1969) (three judge court), affirmed 397 U.S. 98 (1970); *accord United States v. Palladino,* 475 F.2d 65, 70-71 (1st Cir. 1973). Moreover, petitioner's argument that to be constitutional the admissibility of this evidence must be limited to close cases is wholly without merit on the instant record. It overlooks that the jury was instructed it had to find all three factors, beyond a reasonable doubt, before it could determine that this material was obscene. More importantly, it ignores California's non-statutory procedure, which precludes the prosecution from proceeding if the matter is non-obscene as a matter of law. This procedure avoids the greatest threat to First Amendment guarantees, conviction on the basis of non-obscene material, and developed from the case of *People v. Noroff,* 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967). There the trial court dismissed a prosecution for selling allegedly obscene matter after viewing the material and determining that it was constitutionally protected. The prosecution appealed, arguing that even though the material was not obscene the jury could still convict based on evidence of defendant's commercial exploitation as in *Ginzberg v. United States, supra.* The California Supreme Court affirmed the trial court's dismissal on the grounds that unlike Title 18 U.S.C. section 1461, the offense of which defendant Noroff was charged, California Penal Code section 311.2 did not encompass the offense of advertising obscene matter. Thus, evidence of circumstances of production and dissemination can never be

used in California to convict a defendant for selling constitutionally protected material, regardless of the manner in which he had pandered it. A "Noroff" motion was made by petitioner prior to trial in the instant case and was denied (CT 62). Clearly therefore, there was, at the very minimum a "close case" presented to the jury in the instant case. We do not, of course, concede that this was a close case. On the contrary, the obscenity of these films is patent. The jury was given the definition of obscenity mandated by California law, a definition which affords greater protection than constitutionally required. *Hicks v. Miranda,* 419 U.S. 1018 (1975); *Bloom v. Municipal Court,* 16 Cal.3d 71, 127 Cal.Rptr. 317 (1976). Having been so instructed the jury could properly consider evidence of the circumstances of production and dissemination of this material to determine its social value on their way to finding petitioner guilty of selling obscene matter. *Hamling v. United States, supra; compare Kaplan v. California,* 413 U.S. 115, 122 fn. 5 (1973).

2. There was Sufficient Evidence to Justify Giving the Challenged Instructions.

Petitioner argues that there was insufficient evidence of "commercial exploitation" adduced at trial to justify giving instructions based on California Penal Code section 311(a)(2), and that, as applied to him, the "pandering doctrine" has been overbroadly construed. These arguments, we submit, reveal a misperception of the purpose of the statute and instructions.

At trial the jury was instructed, in part, as follows:

> "In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal." (Appendix, p. 38).

Clearly, therefore, the question of commercial exploitation was for the jury to determine, based on facts adduced at trial. Petitioner correctly observes that the buyer made at least six attempts to obtain the films before the sale was successfully consummated. He fails to point out, however, that during the entire course of these prolonged negotiations, the buyer was consistently told by petitioner and his agents that the films were "hardcore". Indeed, the buyer was advised that the films were "under the counter", and was told that persons in the films would be "sucking toes, licking navels and everything else." Significantly, petitioner told the buyer that he had to be careful handling such "hardcore" material, as doing so had caused him to be "in a jam" with the police before. All of this evidence, we submit constitutes evidence of the circumstances of sale and thus justifies the giving of the challenged instructions.[4]

[4]Although respondent views the evidence as sufficient on the circumstances of sale and dissemination, it should be observed that if there were no such evidence petitioner's complaint would be unjustified. In that instance, there would be no danger at all that the jury could have based its finding of obscenity on anything other than the matter itself.

Neither is there merit to petitioner's complaint that the doctrine has been overbroadly construed as applied to him. The flaw in petitioner's argument is demonstrated by his assertion that the "pandering doctrine is designed to permit control of excessive, exploitive behavior, not to penalize normal commercial activity." This statement misperceives the purposes of California Penal Code section 311(a)(2) and the instructions given in the instant case. It is not the control of such conduct which is contemplated. Rather, it is the concept articulated by this Court in *Ginzberg v. United States,* 383 U.S. 463, that such evidence is *relevant* on the issue of redeeming social importance claimed for such matter. Thus, the doctrine does not provide the jury an alternative avenue to a conviction for the sale of obscene matter. Instead, its purpose is to allow the jury to consider relevant evidence on the issue of pruriency and redeeming social importance, which are elements essential to a finding of obscenity. When, as here, there is evidence of the circumstances of production, the film itself, its sale and distribution, such instructions are properly given.

3. Petitioner has not been Subjected to an Ex Post Facto Application of a Penal Statute.

The basic premise of petitioner's argument is that he has been convicted of "pandering" on evidence of conduct he believed non-culpable following the decision in *People v. Noroff,* 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967). Respondent disagrees.

Petitioner was convicted for selling obscene matter in violation of California Penal Code section 311.2

(Appendix, p. 26). California Penal Code section 311(a)(2) merely recognizes the probative value of evidence of production and dissemination on one of the three definitional requirements for a finding of obscenity. The constitutionality of considering such evidence as probative on the question of social value has been recognized since at least 1966. *Ginzberg v. United States,* 383 U.S. 463 (1966); but see *United States v. Rebhuhn,* 109 F.2d 512 (2nd Cir. 1940). California courts have similarly recognized the probative value of this evidence. *People v. Kuhns,* 61 Cal. App.3d 735, 132 Cal.Rptr. 725 (1976); *People v. Burnstad,* 32 Cal.App.3d 560, 108 Cal.Rptr. 247, overruled on other grounds in *People v. Superior Court (Freeman),* 14 Cal.3d 82, 87, 120 Cal.Rptr. 697, 701 (1975); *People v. Stout,* 18 Cal.App. 3d 172, 95 Cal.Rptr. 593 (1971); *Landau v. Fording,* 245 Cal.App.2d 820, 824, 54 Cal.Rptr. 177, 179-180 (1966), affirmed per curiam, 387 U.S. 456 (1967) disapproved on other grounds, *People v. Noroff,* 67 Cal.2d 761, 793, 63 Cal.Rptr. 575, 576 (1967).[5] The enactment of California Penal Code section 311(a)(2) did not aggravate the punishment for selling obscene matter, nor lower the standard of

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[5]Contrary to petitioner's assertion California Penal Code section 311(a)(2) was not adopted in response to *People v. Noroff, supra* (Brief for Petitioner, p. 13). That case merely held that California Penal Code section 311.2 did not encompass the crime of "pandering" non-obscene matter. The proposed legislation referred to in *People v. Noroff,* 67 Cal. 2d at 793, fn. 3, 63 Cal. Rptr. at 576, that would have created such an offense was not adopted. California Penal Code section 311(a)(2) recognizes the probative value of the circumstances of production and dissemination on the issue of social value and was adopted, if in response to anything, to this court's decision in *Ginzberg. Compare Ginzberg v. United States,* 383 U.S. at 470 with California Penal Code section 311(a)(2); *People v. Kuhns,* 61 Cal.App.3d at 749, 132 Cal.Rptr. at 732 (1976).

proof required for conviction. Neither did its adoption create the crime of "pandering". Advertising or promoting the sale or distribution of obscene matter is proscribed by California Penal Code section 311.5. Distinguishably California Penal Code section 311 (a)(2) is similar to a statute making a witness competent to testify [*Hopt v. Utah,* 110 U.S. 574, 587-590 (1884); *People v. Bradford,* 70 Cal.2d 333, 343-344, fn. 5, 74 Cal.Rptr. 726, 731 (1969)] or authorizing the use of handwriting exemplars [*Thompson v. Mississippi,* 171 U.S. 380, 386-388 (1898); *People v. Snipe,* 25 Cal.App.3d 742, 747-748, 102 Cal.Rptr. 6, 9 (1972)]. The application of such statutes to pending suits is not an unconstitutional *ex post facto* alteration of the legal rules of evidence. *Luria v. United States,* 231 U.S. 9, 27 (1913); *Thompson v. Mississippi, supra; Hopt v. Utah, supra; Ward v. California,* 269 Fed.2d 906, 907 (9th Cir. 1959).

At least since the date of *Ginzberg,* evidence of production and dissemination of the material in question has been constitutionally admissible in obscenity prosecutions *even in the absence of a specific statute. Hamling v. United States,* 418 U.S. 87, 130 (1974). Hence, petitioner's claim that he was subjected to a retroactive application of California Penal Code section 311(a)(2) is meritless. *Compare Kaplan v. California,* 413 U.S. at 122, fn. 5. But even if the admission of this evidence required enactment of California Penal Code section 311(a)(2), the correct date for its application was the date of petitioner's trial. *People v. Bradford,* 70 Cal.2d 333, 343-344, fn. 5, 74 Cal.Rptr. 726, 731 (1969). Since the admission of such evidence

supported Ralph Ginzberg's conviction in 1966, petitioner cannot assert an unconstitutional application to his conduct in 1969.

To extend petitioner's argument by analogy, a defendant could claim that a statute recognizing the probative value of fingerprint evidence was wrongfully applied in his case, urging that had he known of the admissibility of such evidence he would have worn gloves at the time he committed the crime. Such a specious argument founders on the shoals of California Evidence Code section 351 which provides, "Except as otherwise provided by statute, all relevant evidence is admissible." (Statutes 1965, chapter 299, §351).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the California Court of Appeal be affirmed.

Dated, February 10, 1977.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Three

Motion for leave to file brief of Citizens for Decency Through Law, Inc., as Amicus Curiae in support of the respondent, with brief annexed.

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Interest of Amicus Curiae.

Citizens for Decency through Law, Inc. (short title C.D.L., formerly Citizens for Decent Literature, Inc.) an Ohio Corporation, with local affiliates throughout the United States, is a non-profit, non-sectarian, and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the support of this nation's obscenity laws by cooperating with law enforcement in the enforcement of

the obscenity laws. C.D.L.'s request to appear as amicus curiae on behalf of the Respondent, People of the State of California, arises out of its interest that this Court, in the cause herein, should enunciate a rule of law which clearly distinguishes between the substantive crime of "pandering", which proscribes the promotion of obscenity (whether or not the subject matter is, in fact, obscene)[1], and the use of probative evidence of "pandering" to establish social detriment (lack of redeeming social importance) in the substantive crime of dealing in obscenity.[2]

1/ California Penal Code Section 311.5 was originally enacted in 1961. The language of the 1961 statute was interpreted in Kirby v. Municipal Court of the Newhall Judicial District et al. 237 Cal. App.2d 335, 46 Cal.Rptr. 844 (Sept. 30, 1965) as codifying the "pandering" crime of Sec. 207.10 of the 1957 draft of the Model Penal Code. (See Brief at pages 3-4). In 1969, the awkward language of P.C. 311.5, as originally enacted in 1961, was amended to conform the text to the legislative intent expressed in Kirby. As amended in 1969, P.C. Section 311.5 now reads:

> "Section 311.5. Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor."

In searching for means of harnessing the porno trade, this Court should not overlook the tremendous potential of a substantive statute, such as P.C. Section 311,5, in law enforcement efforts.

The written consents of the petitioner and the respondent have been requested and both parties have consented in writing. Copies of such consents are being filed with this Court, concurrently with this motion.

In his written consent, the Attorney-General of the State of California indicated that the Clerk of the Supreme Court had informed that office that "petitioner's brief was due on or before January 21, 1977 and respondent's brief thirty days after receipt of petitioner's brief." Moving party understood the same to mean that respondent's brief would be due on February 22, 1977. In a phone conversation with the office of the Clerk of the U.S. Supreme Court on February 14, 1977, moving party was advised that respondent's brief was due on February 22, 1977. A telephone conversation with the Office of the Attorney-General of the State of California on the same date revealed, however, that the respondent's brief was filed on February 12, 1977. Because Rule 42.2 requires an amicus brief to be "presented within the time allowed for the filing of the brief of the party supported"

2/ California Penal Code Section 311.2.

and because of uncertainty as to the correct date for filing to meet that requirement, moving party respectfully requests leave of court to file the within amicus brief, if the same is tardy under Rule 42.2.

Respectfully submitted,

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UNITED STATES CONSTITUTION

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PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Three

Brief Amicus Curiae of Citizens for Decency Through Law, Inc., in Support of the Respondent

ARGUMENT

I

PETITIONER'S ARGUMENTS, WHICH INCORRECTLY DESCRIBE PENAL CODE SECTION 311.2 AS THE "CALIFORNIA PANDERING LAW", HAVE CREATED A STRAW MAN WHICH DOES NOT EXIST.

A. The California Statutes Set Forth Two Substantive Obscenity Crimes Which Are Separate And Distinct. One Deals With "Obscenity", And The Other Deals With "Pandering".

The California Statutes set forth two substantive obscenity crimes which are separate and distinct; namely, California Penal Code sections 311.2 and 311.5.

The substantive crime of trafficking in obscenity, Penal Code section 311.2, has two elements: (1) the knowing sale of; (2) obscene matter. As used in this section, "obscene matter" means matter which is "limited to patently offensive representations or descriptions of the specific 'hard-core' sexual conduct given as examples in Miller I, i.e., 'ultimate sexual acts, normal or perverted, actual or simulated,' and 'masturbation, excretory functions, and lewd exhibitions of the genitals.'" Bloom v. Municipal Court for the Inglewood Judicial District of Los Angeles County, 16 Cal. 3d 71, , 127 Cal.Rptr. 317, 323 (February 6, 1976).

On the other hand,the substantive crime of "pandering"obscene matter, Penal Code section 311.5 has an entirely different burden of proof; namely, an intent to "promote" etc. for sale or distribution as pornographic, subject matter which may or may not prove to be pornographic. Kirby v. Municipal Court of the Newhall Judicial District et al., 237 Cal. App. 2d 335, 46 Cal. Rptr. 844 (September 30, 1965). Hearing denied by the California Supreme Court on November 24, 1965.

The distinction between Penal Code section 311.2 and 311.5, which the California Legislature intended when the latter section was enacted in 1961, is set forth in Kirby v. Municipal Court of the Newhall Judicial District, supra, at p. 854:

> "We hold that imposing criminal sanctions upon advertising or representing or holding out of any writing as obscene, the telling where to get it, is intrinsically needed and designed for protection of those who have depraved tastes and desires, as much so as is the display of same at the moment of sale, and that section 311.5 is constitutional when applied to one who acts without actual knowledge of the contents or complexion of the written matter that he promotes.

Section 311.5 was enacted in 1961 after American Law Institute has completed its 1957 draft of Model Penal Code. Our Supreme Court in Zeitlin v. Arnebergh, supra, 59 Cal.2d 901, 911, 31 Cal.Rptr. 800, 383 P.2d 152 stated that the Legislature patterned its definition of obscenity upon one set forth in said Model Penal Code and it is fair to assume that section 311.5 was modeled upon section 207.10 of that Code, the purpose of which is explained in comments found

on page 53 of Tentative Draft No. 6, viz.: 'Subsection (6) adopts a suggestion from the New York Penal law punishing advertising or other promotion of material "purporting to be" obscene. In other words, if the actor plays on prurient interest, holding out the promise of forbidden thrills, he may be convicted without proof that any particular material he meant to supply meets the tests of obscenity set forth in subsection (2). Such advertising may legitimately be forbidden as probably fraudulent, and also on the ground that a strong suggestion that a book or picture is obscene may well make it so in the mind of those who are persuaded to buy on this basis. It has been suggested that such huckstering is in fact worse than deliberate sale of genuine obscenity because: (1) the purchaser has frustration and a sense of being cheated in addition to his sense of guilt over desiring eroticism, and (2) it often constitutes a kind of defamation of serious works or learning or beauty."

B. The Evidence Of "Pandering" Which, By Itself, Would Support A Conviction Of Penal Code Section 311.5, Is Also Admissible Upon A Penal Code Section 311.2 Charge, Being Probative On Both Elements Of That Crime; i.e., (1) The Mens Rea Of "Knowingly", and (2) Whether Or Not The Subject Matter Has Redeeming Social Value.

Petitioner was convicted for selling obscene matter in violation of California Penal Code Section 311.2.

The evidence which was adduced at trial showed that Armand Drivon, a part-time employee of the Redwood City Police Department had known petitioner since 1966 when petitioner first offered "hardcore" pornography to Mr. Drivon (RT 44). In 1969, Mr. Drivon began negotiating with appellant's brother Don Splawn for the purchase of some "hardcore" films at petitioner's place of business, the Golden Gate Book Store located in Redwood City. Don Splawn advised Drivon that he had two "under-the-counter" films available for sale at a price of $50.00 apiece, but stated that these films were not carried in stock at petitioner's bookstore (RT 28). Several unsuccessful appointments were arranged

for Drivon to pick up the films (RT 29-34). During the course of negotiations, Don Splawn assured Drivon that he would be completely satisfied with the films. Describing the "hard-core" films he told Drivon that they would be sucking toes, licking navels and everything else (RT 30). He also mentioned that the films were being supplied by petitioner (RT 33). On November 4, 1969, Drivon met with petitioner at petitioner's bookstore to further discuss the purchase of these films (RT 35-36). Petitioner made a telephone call in an attempt to locate some films then left the store returning a few minutes later. Petitioner told Drivon that he could obtain the films in two days, but if Drivon was in a great hurry petitioner offered to go to San Francisco to pick them up (RT 37). They settled on the price of the films, which petitioner stated were normally selling for much more in San Francisco. Petitioner also explained to Drivon that he had to be very careful in handling these films since they were "hardcore" material concerning which he had previously had trouble with the police (RT 46). Petitioner assured Drivon that he would be getting strictly "hardcore" material (RT 47). When Drivon returned to petitioner's bookstore on November 7, 1969, the clerk gave

him a package containing two reels of film in exchange for $70.00 (RT 47). Drivon thereafter contacted petitioner by telephone, and from their conversation it was apparent that petitioner had previously viewed these films (RT 72). Petitioner admitted viewing the films prior to their sale (RT 633). The films themselves were admitted into evidence (RT 97) and are hard core pornography.

The trial court also permitted photographs, which showed the condition of the premises, to be introduced into evidence on the issue of the obscenity of the material (RT 77-83).

While it seems clear that the above direct and circumstantial evidence would support a conviction of "pandering" under Penal Code section 311.5, without any consideration as to whether the subject matter were obscene, the petitioner was not charged with that crime, nor should he be permitted, on this appeal, to create a straw man out of the issues which an appeal from a conviction under that section (Penal Code section 311.5) might raise. The respondent's burden of proof herein, under Penal Code section 311.2, was to establish that the subjects matter was hard-core pornography, and the central issue on this appeal should be limited to that of whether such "pandering type" evidence is probative

on the elements of the Penal Code section 311.2 crime, and whether the petitioner could reasonably be charged with notice of that evidentiary ruling.

In giving the challenged instruction on "pandering",[3/] the trial court merely recognized

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3/ (1) (I)n determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled is a matter for you, the Jury, to determine. (RT 882). (A 38).
(2) Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter (is) utterly without redeeming social importance. (RT 883). (A 39).
(3) If the object of work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, this may be considered as evidence, that the work is obscene. (RT 883). (A 40).

the probative value of evidence of production and dissemination on one of the three definitional requirements for a finding of obscenity. The constitutionality of considering such evidence as probative on the question of social value was recognized by this Court in Ginzberg v. U.S., 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942 (March 21, 1966), and its application to California Law was almost immediately thereafter considered by the California Courts in Landau v. Fording, 245 Cal.App. 2d, 820, 824, 54 Cal.Rptr. 177, 179-180 (October 24, 1966) (more than three years before the date of the alleged offense). See also, People v. Stout, 18 Cal.App.3d 172, 95 Cal.Rptr. 593 (June 18, 1971); People v. Burnstad, 32 Cal.App.3d 560, 108 Cal.Rptr. 247, 251 (May 22, 1973) overruled on other grounds in People v. Superior Court, 14 Cal. 3d 82, 120 Cal.Rptr. 697, 701 (April 22, 1975); People v. Kuhns, 61 Cal.App.3d 735, 132 Cal.Rptr. 725, 714 (September 8, 1976) petition for writ of certiorari filed on January 13, 1977 in No. 76-970.

While the California Supreme Court in People v. Noroff, 67 Cal. 2d 761, 793, 63 Cal.Rptr. 575, 576 (November 21, 1967) noted a caveat as to the dictum in Landau v. Fording, supra, that Court, as was pointed out by the Court of Appeal below, "did not disapprove of any use of evidence

of pandering for its probative value on the issue of whether the material was obscene. It merely rejected the concept of pandering of nonobscene material as a separate crime" within Penal Code section 311.2.[4/]

C. The Ruling Of The Trial Court Below, That Evidence Of "Pandering" Is Probative On The Issue Of Social Value Within The Framework of Penal Code Section 311.2 As It Existed Prior To The 1969 Amendments, Does Not Present A Substantial Federal Question.

The opinion of the California Court of Appeal below clearly indicates that Penal Code section 311.2, as worded at the time of the offense in November of 1969, did allow "pandering" evidence on the issue of social value. That con-

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4/ It should be noted that when the California Supreme Court in Noroff stated:

> "We cannot accept the People's argument, advanced for the first time on appeal, that the trial court should have permitted the prosecution to go to the jury with evidence bearing upon the defendant's 'pandering' of the magazine in question. First, the indictment did not charge the defendants with pandering; second, the State Legislature has created no such crime."

it was addressing itself only to the scope of the Penal Code section 311.2 crime, as to which Noroff was charged. The Noroff opinion did not mention or consider Penal Code section 311.5, which clearly, under Kirby, supra, is a "pandering" crime. Amicus understands the Noroff court to have said that Penal Code section 311.2 does not encompass the "pandering" crime set forth in Penal Code section 311.5 (which does not require a finding that the subject matter is obscene).

struction of Penal Code section 311.2, as adopted by the California Courts is binding on this Court. General Trust Co. v. Blodgett, 287 U.S. 509, 513; Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688.

In People v. Kuhns, supra, the California Court of Appeal noted at p. 734:

> "It well may be that defendants' arguments no longer rise to the level of constitutional dignity because the statute is merely a rule of evidence to be judged by ordinary standards of reasonableness. Be that as it may, we find no violation of constitutional principles as expostulated in Ginzburg and other cases reviewed above."

As noted above, any question of reasonableness which might have been raised regarding the probative nature of "pandering" evidence on the issue of social value was answered by this Court in Ginzburg v. U.S., supra.

D. Petitioner Has Not Been Subjected To An Ex Post Facto Application Of A Penal Statute.

The understanding of the meaning of the Ex Post Facto Clause has not changed significantly since Mr. Justice Chase announced for a unanimous Court in Calder v. Bull, 3 Dall. 385, 390, that a law is an ex post facto law if it makes criminal, acts which were not forbidden when they occurred; if it increases the punishment for criminal acts; or if it "alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Also, a law is an ex post facto law if "in (its) relation to the offense, or its consequences (it) alters the situation of a party to his disadvantage" or "takes away or impairs the defense which the law has provided the defendant" at the time of the offense. Kring v. Missouri, 107 U.S. 221, 228-229 (quoting from United States v. Hall, 26 Fed. Cas. 84, 86-87 (No. 15,285).

Amicus submits that the judicial construction adopted by the California Courts below was forseeable, and a reasonable person would not have been caught unawares. At least since the date of Ginzburg, in 1966, evidence of production

and dissemination of the material in question has been constitutionally admissible in obscenity prosecutions, without the necessity of a specific statutory provision. The reasonableness of that ruling was recently reaffirmed in Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 628, 94 S.Ct. 2887 (June 24, 1976) where this Court noted:

> "Petitioners contend that the instruction was improper on the facts adduced below and that it caused them to be 'convicted' of pandering. Pandering was not charged in the indictment of the petitioners, but it is not, of course, an element of the offense of mailing obscene matter under 18 U.S.C. § 1461 (18 U.S.C.S. § 1461). The District Court's instruction was clearly consistent with our decision in Ginzburg v. United States, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942 (1966), which held that evidence of pandering could be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition of obscenity is applied."

Although Bouie v. City of Columbia, 378 U.S. 347 (1964) does hold that a retroactive application of a court interpretation may offend the Due Process Clause, the Bouie holding is to be applied only to decisions which are "unexpected and in-

defensible by reference to the law which had been expressed prior to the conduct in issue...." Id. at 354.

The Petitioner, herein, has been on notice since Landau v. Fording, supra, in 1966 that such evidence of "pandering" would be admissible in California Courts on the determination of the obscenity of the materials at issue. See also, Bradley v. Richmond School Board, 416 U.S. 696, 40 L.Ed.2d 476, 94 S.Ct. 2006 (May 15, 1974) at 493, where this Court held:

> "From the outset, upon the filing of the original complaint in 1961, the Board engaged in a conscious course of conduct with the knowledge that, under different theories, discussed by the District Court and the Court of Appeals, the Board could have been required to pay attorneys' fees. Even assuming a degree of uncertainty in the law at that time regarding the Board's constitutional obligations, there is no indication that the obligation under § 718, if known, rather than simply the commonlaw availability of an award, would have caused the Board to alter its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs.

Conclusion

For the foregoing reasons, the judgment below should be affirmed.

DATED: February 20, 1977.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on this 20th day of February, 1977, copies of the within Motion of Citizens for Decency Through Law, Inc., For Leave To File a Brief as Amicus Curiae in Support of the Respondent People of the State of California; and Brief Amicus Curiae of Citizens for Decency Through Law, Inc., an Ohio Corporation, in Support of Respondent People of the State of California were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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